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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: JAN 12 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).

A handwritten signature in black ink that reads "Michael Shumway".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Chile and is married to a United States legal permanent resident (LPR). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her LPR husband. The applicant applied to adjust to LPR status at the California Service Center in December 2005. The director found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act) for having been convicted of crimes involving moral turpitude.

The applicant seeks waiver of her inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her spouse and grandchildren. The director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly.

On appeal, the applicant stated,

I, [REDACTED] (,) did establish extreme hardship. The INS service (d)id not properly consider or research the favorable factors (i)n my case. I also have favorable factors besides extreme hardship. I would like to appeal.

The applicant submitted no additional evidence or argument on appeal. The record does not reveal the nature of the additional favorable factors to which the applicant referred on appeal. Although counsel submitted no evidence or argument on appeal he has not withdrawn his appearance, and ostensibly continues to represent the applicant.

Previously, counsel submitted a brief, dated July 26, 2006, in support of the application for waiver. In that brief, counsel stated that the applicant is not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, as she made no misrepresentation to secure a visa, or admission to the United States, or any other immigration benefit. The director did not directly address counsel's argument pertinent to section 212(a)(6)(C)(i) of the Act.

The AAO concurs with counsel that the applicant is not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. The Form I-485 in the record shows that, at item 1 in Part 3, the applicant admitted that she had been arrested, cited, charged, indicted, fined or imprisoned for a violation of the law. The record contains no indication that the applicant has ever made a material misrepresentation to secure an immigration benefit. The remainder of today's decision will address inadmissibility pursuant to 212(a)(2)(A)(i)(I) of the Act, as found by the director, and whether waiver of inadmissibility should be granted pursuant to section 212(h) of the Act.

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

- (2) Criminal and related grounds. —
 - (A) Conviction of certain crimes. —

- (i) In general. – Except as provided in clause (ii), any 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 record contains the judgment in criminal case _____ before the United States District Court for the Southern District of Florida, Miami Division, which shows that the applicant was convicted, pursuant to her pleas, of one count of producing/using/trafficking in a counterfeiting device (credit card skimming machine) in violation of 18 U.S.C. § 1029(a)(4); and one count of conspiracy to produce/use/traffic in a counterfeit access device (credit card), in violation of 18 U.S.C. § 1029(b)(2), as charged in Count 1 of the indictment in that case.

The statute 18 U.S.C. § 1029 at subsection (a)(4) states that one is guilty of a violation of that subsection if one “knowingly, and **with intent to defraud**, produces, traffics in, has control or custody of, or possesses device-making equipment.” [Emphasis provided.] Count 1 of the indictment, the count concerning conspiracy, alleges that the applicant “knowingly and **with intent to defraud**” conspired to violate §1029(a)(1) and (2). [Emphasis provided.]

Neither counsel nor the applicant disputed that the applicant’s convictions are for crimes involving moral turpitude. The AAO will, however, consider that matter.

Fraud is a crime involving moral turpitude (CIMT), and any crime involving fraud is a CIMT. *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965), cert. denied, 383 U.S. 915 (1966). Further, conspiracy is a CIMT where the objective of the conspiracy is a CIMT. *See Jordan v. De George*, 341 U.S. 223 (1951); *see also Omagah v. Ashcroft*, 288 F.3d 254 (5th Cir. 2002), *Matter of Short*, Interim Decision 3125 (BIA 1989). Therefore, both of the applicant’s convictions are of crimes involving moral turpitude and either is sufficient to render the applicant inadmissible.

Section 212(h) of the Act provides, in pertinent part,¹ that the Attorney General may, in his discretion, waive inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act: Section 212(h) of the Act states, in pertinent part,

(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

¹ That section also allows for waiver for reasons that counsel has not asserted are relevant here, and which, to the AAO, appear irrelevant.

A waiver of inadmissibility under section 212(h) 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, son, or daughter of the applicant.

Counsel noted in his brief, dated July 26, 2006, that the applicant's daughter, mother of the two grandchildren in question, has been deported to Chile², and that the applicant provides full-time care for those grandchildren. Counsel stated, as to those grandchildren, "[The applicant] is their mother and grandmother." Counsel provided no argument or precedent in support of the implicit proposition that the applicant's grandchildren should be regarded as her children for the purpose of the instant application for waiver.

Counsel also submitted an affidavit from the applicant's husband. In that affidavit the applicant's husband stated that he and his wife have custody of the applicant's grandchildren because their mother was deported and their father is in prison, and offered arguments pertinent to the hardship that deportation of the applicant would cause to her grandchildren. Some of those arguments are pertinent to the hardship that would be occasioned if they accompanied the applicant to Chile, and some relate to the hardship that would be occasioned to them if she left and they remained in the United States.

The applicant's husband notes that he must report to his doctor regularly and concludes that he is therefore unable to care for the grandchildren by himself. In support of that assertion, counsel submitted a letter dated June 8, 2006 from a cardiologist. That letter states that, since placement of a stent and angioplasty to a marginal branch, the applicant's husband has been asymptomatic and has resumed normal activities, and that he is now seen only once every six months. The AAO notes that a checkup once every six months does not preclude caring for children.

The record demonstrates that on September 23, 2004 the applicant and her husband were granted co-guardianship of the applicant's grandchildren. The director concluded that, notwithstanding that custody award, the applicant's grandchildren do not qualify as her children within the meaning of section 212(h)(1)(B) of the Act, and that the hardship that might result to them is, therefore, not directly relevant to the application for waiver pursuant to that subsection. The director further found that the applicant had not demonstrated that denial of admission to the applicant would result in extreme hardship to her husband.

As was noted above, neither counsel nor the applicant submitted any argument or precedent in support of the proposition, only implicitly asserted, that the applicant's grandchildren should be regarded as her children. The AAO is aware of no such precedent nor any convincing argument that could support that proposition. Absent a legal adoption, the AAO is not persuaded that the applicant's grandchildren are her children for the purpose of the waiver application.

The AAO concurs, therefore, with the finding of the director that, pursuant to the controlling

² Counsel stated, in the brief submitted with the application for waiver, that the applicant's daughter was removed to Chile in July 2006, after finishing her 2004 sentence for convictions of robbery, larceny, and assault.

statute, the hardship that might result to the applicant's grandchildren is not directly relevant to the instant application for waiver. Hardship to the applicant or her grandchildren will be considered only insofar as it results in hardship to a qualifying relative. The only qualifying relative in this case is the applicant's LPR husband. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996).

Even if hardship to the applicant's grandchildren were a valid consideration in adjudicating this application this application would fail to demonstrate any impending extreme hardship to them. The record does not demonstrate that they could not accompany their grandmother to Chile and reside there either with their mother, their grandmother, or both.

Counsel also argued that extreme hardship would result to the applicant's LPR husband if the applicant is not permitted to remain in the United States. In that regard, counsel noted that the applicant and her husband had then been married for ten years, and stated that the applicant has provided her husband emotional and financial support. Counsel further noted, as was discussed above, that the applicant's husband has been diagnosed with and treated for coronary artery disease, which, he stated, necessitates the applicant's financial support and physical assistance.

Counsel did not document the financial support the applicant has allegedly provided her husband.³ As to the applicant's husband's arterial disease, counsel submitted the cardiologist's June 8, 2006 letter, discussed above. That letter states that the applicant's husband was diagnosed with moderate three-vessel coronary artery disease. It further states that, since placement of a stent and angioplasty to a marginal branch, the applicant's husband has been asymptomatic and has resumed normal activities, and that he is now seen only once every six months. That document is insufficient support for the proposition that the applicant's husband's medical condition necessitates the applicant's financial support and physical assistance, as counsel alleged.

Although the hardship that might be occasioned to applicant's grandchildren is not directly relevant to the applicant for waiver, it does have some peripheral relevance. If removal of the applicant from the United States would force the applicant's husband to care for those children, and forcing him to care for them would cause extreme hardship to the applicant's husband, that would be relevant to the applicant's eligibility for waiver, as the applicant's husband is a qualifying relative under section 212(h) of the Act. Although neither counsel nor the applicant raised this issue, the AAO will consider it.

As the applicant's grandchildren appear to be able to move to Chile with their grandmother, no

³ The record contains the 2002 Form 1040 joint Federal tax return of the applicant and her husband. That return shows that the applicant's husband earned \$28,313 during that year and had other income of \$4,236, but that the applicant herself had no income. This does not indicate that the applicant was then providing her husband with any financial support. The record also contains a letter dated June 8, 2006 from the president of a mortgage company in East Hartford, Connecticut. That letter states that the applicant works for that company, but does not discuss her income or how long she has held her position. Otherwise, the record contains no evidence pertinent to any income the applicant may have or may ever have had.

reason exists to consider whether forcing the applicant's husband to raise them unaided would cause him extreme hardship. They need not necessarily remain in the United States, but could accompany their grandmother to Chile and live there. Whether that would occasion hardship to them, as is discussed thoroughly above, is not a permissible consideration in the adjudication of the instant waiver application.

The remaining hardship that may be considered in this adjudication is the harm that would be directly caused to the applicant's husband by the applicant's absence. In that regard, the applicant has argued that her husband is sentimentally attached to her, based on their ten-year marriage, and that he requires her physical assistance and financial support.

As was noted above, the record contains no evidence that the applicant's husband relies on her financial support or her physical assistance. The assertions of counsel are an insufficient substitute for evidence.

As to the emotional loss that would ensue from the applicant's removal, the AAO notes that in nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship" [emphasis provided] indicates that Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in INA § 212(i), be above and beyond the normal, expected hardship involved in such cases.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

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).

The Ninth Circuit Court of Appeals has stated, “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). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she 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 and the applicant asserted that two types of hardship would accrue to the applicant’s husband if she is not accorded a waiver. They state that he would lose her financial and physical assistance, both necessitated by his recent illness, and they state that he would also be deprived of her emotional support.

No evidence in the record supports that the applicant’s husband is dependent on her financial support or physical assistance, or that his illness is serious enough that this office should infer, absent such direct evidence, that he requires them. As to the loss of emotional support, the AAO finds that this is no greater than the common result of removal contemplated in the line of cases discussed above, and that it is insufficient to constitute extreme hardship within the meaning of section 212(h) of the Act.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant’s spouse faces extreme hardship if the applicant is not granted a waiver of inadmissibility.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not sustained that

burden.

ORDER: The appeal is dismissed.