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U.S. Citizenship
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FILE:

Office: DENVER, COLORADO

Date:

12 2009

IN RE:

Applicant:

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.

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, Denver, Colorado, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [REDACTED], is a native and citizen of Mexico 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 fraud by check in violation of Colorado Revised Statutes § 18-5-205(2),(3)(c), a crime involving moral turpitude. The applicant sought a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with her lawful permanent resident father and U.S. citizen children.

The district director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), finding the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, *Decision of the District Director*, dated June 13, 2006. The applicant submitted a timely appeal.

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

(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.

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 record shows that on September 15, 2003, in the District Court of Eagle County, Colorado, the applicant pled guilty to, and was convicted of, fraud by check in violation of Colorado Revised Statutes § 18-5-205(2),(3)(c).¹ The judge deferred the sentence of four years unsupervised probation, and the order to pay fines, costs, and restitution.

¹ Colorado Revised Statutes § 18-5-205 provides the following:

The AAO finds the applicant's conviction involves moral turpitude. *Matter of Bart*, 20 I&N Dec. 436 (BIA 1992), conveys that issuance of a bad check, where intent to defraud is an essential element of the offense, is a crime involving moral turpitude.

The AAO notes that counsel indicates that the applicant's conviction does not fall within the petty offense exception found in section 212(a)(2)(ii) of the Act because the maximum penalty possible for the applicant's conviction exceeds one year of imprisonment.

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 are the applicant's lawful permanent resident father and her U.S. citizen children, who are 10 and 9 years old (twins). If extreme hardship to the qualifying

(2) Any person, knowing he has insufficient funds with the drawee, who, with intent to defraud, issues a check for the payment of services, wages, salary, commissions, labor . . . commits fraud by check.

(3) Fraud by check is:

(c) A class 6 felony . . .

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 support of the waiver application, the record contains articles by High Beam Research, Inc. about separation and its impact on young children; birth certificates of the applicant's children; affidavits by the applicant; an affidavit by the applicant's father; an affidavit by the father of the applicant's children; letters by friends and by [REDACTED] a catechism teacher; a college transcript showing 42 units completed and two courses taken; a currency conversion result regarding the peso; Online Wage Library information about nurses; photographs; a medical record by Vail Valley Medical Center pertaining to the applicant's father that is illegible; and other materials.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors, which relate to the applicant's qualifying relative, include 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 565-566.

The factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). The trier of fact considers the entire range of hardship factors in their totality and then determines "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).

On appeal, counsel states that an applicant's adverse factors, such as criminal convictions, must be overcome with favorable evidence to demonstrate the "extreme hardship" that removal would cause her family. The AAO disagrees. An applicant need not overcome any adverse factors in order to establish extreme hardship to a qualifying relative. Once 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).

Counsel asserts that the importance of family must be considered in determining hardship. The AAO acknowledges that it has been held that "the family and relationship between family members is of paramount importance" and that "separation of family members from one another is a serious matter requiring close and careful scrutiny. *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987), citing *Bastidas v. INS*, 609 F.2d 101 (3rd Cir. 1979).

An analysis of the factors in *Matter of Cervantes-Gonzalez* is appropriate here. Extreme hardship to the applicant's qualifying relative must be established in the event that she or he joins the applicant, and alternatively, if she or he 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 rendering this decision, the AAO will carefully consider and give proper weight to the evidence in the record.

With regard to living in Mexico, the applicant's 52-year-old father states in his affidavit that he is a lawful permanent resident of the United States and it has been a long time since he lived in Mexico, and that his employment, housing, and medical care would be impacted if he lived in Mexico.

Counsel states that if the applicant's children joined their mother in Mexico they would be uprooted from the United States to Mexico, a country that does not offer similar scholastic or cultural environment, employment opportunities, or health care system. He states that the applicant's children would be separated from their mother while she continues her studies in Mexico because the children would live with extended family members who live 12 hours away from where the applicant would study. Counsel states that the applicant does not have the financial resources or assistance from extended family that would allow her to have her children with her while she attends the university. *Counsel's Brief, dated July 12, 2006.* The applicant indicates that she would deny to her children the rights and opportunities afforded to U.S. citizens if they joined her to live in Mexico. She states that her salary as a nurse in Mexico, as shown by the submitted document, would be significantly less than in the United States. *See Affidavit of the Applicant dated April 27, 2005.*

The consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. In *Matter of Kao & Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concludes that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan; she had lived her entire life in the United States and was completely integrated into an American lifestyle; and uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Circuit Court indicates that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. And, in *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980), the Circuit Court found the BIA abused its discretion in concluding that extreme hardship had not been shown in light of fact that the aliens' five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to land whose language and culture were foreign to her.

In light of the aforementioned decisions and given the age of the applicant's children and their having spent their entire lives in the United States, the AAO finds that the adverse effect of moving from

this country to Mexico rises to the level of "extreme" hardship if the children join the applicant in Mexico.

The applicant's father, [REDACTED], states that he would experience extreme hardship without the applicant's presence because he depends upon her for dealing with medical matters relating to his problem with chronic kidney stones, for providing interpretation and translation, for arranging family events, and for involvement in the lives of his grandchildren, such as taking them to catechism, church picnics, or to Mexican parades. He states that his daughter manages his health, his employment, and his financial responsibilities. *Affidavit by the Applicant's Father, dated September 15, 2005.*

The applicant, who states she is a student and is employed, indicates that her children would experience extreme hardship if separated from her because they depend upon her. *Affidavit of the Applicant dated April 27, 2005.* Counsel indicates that if the applicant did not become a bi-lingual registered nurse in the United States it would cause economic hardship to her children. *Counsel's Brief, dated July 12, 2006.* The letter, dated April 26, 2005, by [REDACTED], the applicant's brother, conveys that he lived with the applicant and her children for a number of years. He states that the applicant and the father of her children, [REDACTED], do not live together, but help each other in raising their children. The letter by [REDACTED] indicates that the applicant and her children live in a house provided by the children's father. The affidavit by Mr. [REDACTED] indicates that he purchased a modest house and a vehicle for his children, and the record reflects that [REDACTED] is paying a mortgage on the house.

The submitted articles on appeal, [REDACTED] and Tips on Easing Kids' Separation Anxiety, deal with the anxiety experienced by a toddler or a child who is four years old and is starting school and separating from his parents. The article, More Young Girls Trying to Grow Up Too Fast, Girl Scout Survey Says, indicates that girls need adults to converse with.

Given that the letters in the record establish that the applicant's children have been raised by both their parents and that they live primarily with the applicant, the AAO finds that they would experience extreme hardship if they were to remain in the United States without her.

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's children and her father, her educational pursuit, and the letters commending her character. The unfavorable factor in this matter is the applicant's criminal conviction, which occurred in 2003. The AAO notes the applicant's initial entry without inspection and periods of unauthorized presence, however most of this time was as a child and is therefore given little weight.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's criminal conviction, it finds that the hardship imposed on the applicant's children and her father as a

result of her inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.