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U.S. Citizenship
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FILE:

Office: LOS ANGELES

Date:

JUL 15 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, Los Angeles, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant 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 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 and child.

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 March 2, 2007.

On appeal, counsel for the applicant asserts that the district director failed to balance positive and negative factors in the present case. *Statement from Counsel on Form I-290B*, dated March 30, 2007. Counsel contends that “[t]he more serious and egregious the act for which forgiveness is sought, the stronger the showing of ‘extreme hardship’ which must be shown.” *Id.* at 1.

The record contains a statement from counsel; statements from the applicant’s husband; a copy of the applicant’s marriage certificate; a copy of the applicant’s husband’s birth certificate; a copy of the applicant’s father-in-law’s U.S. passport; a copy of the applicant’s mother-in-law’s permanent resident card; a copy of the applicant’s birth certificate; a copy of the applicant’s passport; employment and tax documents for the applicant’s husband, and; copies of documents 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.

Section 212(h) of the Act provides, in pertinent part, that:

- (h) The Attorney General [now Secretary, Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I) [or] (B) . . . of subsection (a)(2)
 . . . if -

- (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
- (i) . . . the 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
- (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 on October 2, 2002, the applicant was convicted of petty theft under California Penal Code section 484(A). On July 31, 2003, she pled *nolo contendere* to petty theft with a prior under California Penal Code section 666-484(A). The applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. She has not asserted or shown that her theft was a temporary taking. Thus, there is ample support that her theft crimes constitute convictions for crimes involving moral turpitude. *See U.S. v Esparza-Ponce*, 193 F.3d 1133, 1135-37 (9th Cir. 1999). The applicant does not contest her inadmissibility on appeal.

It is noted that the applicant is not eligible to be considered for a waiver under the standard set in section 212(h)(1)(A) of the Act, as 15 years have not passed since she committed the conduct that led to her convictions. Section 212(h)(1)(A)(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 and child.¹ *Id.* If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act.

¹ It is noted that the district director stated that hardship to the applicant’s child is not a basis for a waiver of inadmissibility in the present matter. However, under section 212(h)(1)(B) of the Act, an applicant’s child is a qualifying relative and hardship to an applicant’s child may serve as a basis for a waiver.

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).

In addition, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States," and that, "[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." (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. The AAO further notes that the applicant's husband and child would possibly remain in the United States if the applicant departs. Separation of family will therefore be carefully considered in the assessment of hardship factors in the present case.

On appeal, counsel asserts that the district director failed to balance positive and negative factors in the present case. *Statement from Counsel on Form I-290B*, dated March 30, 2007. Counsel contends that "[t]he more serious and egregious the act for which forgiveness is sought, the stronger the showing of 'extreme hardship' which must be shown." *Id.* at 1.

Counsel explained that the applicant married her U.S. citizen husband on September 19, 2004. *Brief from Counsel*, dated April 23, 2007. Counsel indicates that the applicant's husband provides assistance and emotional support for his parents in the United States. *Id.* at 2. He noted that the applicant's husband has little knowledge of the Spanish language, thus he would have difficulty in Mexico. *Id.* Counsel asserts that the applicant's husband will experience emotional hardship should he choose to have his child reside with him in the United States or in Mexico with applicant. *Id.*

The applicant's husband stated that his parents were born in El Salvador and that they are both U.S. citizens. *Statement from the Applicant's Husband*, undated. He provided that his father is unemployed because he cannot find a job, and that his mother works part-time as she would not be able to work longer hours. *Id.* at 1. He indicated that, as their only son, he feels he should provide economic support for them. *Id.* He stated that he would not leave his parents, but that he does not wish to be separated from the applicant. *Id.*

The applicant's husband explained that he speaks Spanish poorly and that he would have difficulty adapting to life in Mexico. *Id.* at 2. He stated that parts of Mexico do not have electricity, water, clothes, or food. *Id.* He stated that he would not be able to find employment in Mexico or support his family. *Id.*

The applicant's husband provided that he and the applicant are saving money for their son and that they wish for him to have the advantage of residing in the United States. *Id.* at 3.

Upon review, the applicant has not shown that her husband or child will suffer extreme hardship should she be prohibited from remaining in the United States. It is first noted that, while the applicant provided evidence that she was 32 weeks pregnant as of July 21, 2006, she has not submitted a birth certificate for her son. The applicant has not submitted any other evidence of the birth of her son. Thus, the applicant has not shown by a preponderance of the evidence that she has a son whose hardship may serve as a basis for a waiver under section 212(h)(1)(B) of the Act.

It is further noted that the applicant has not described hardships to her alleged son that can be distinguished from those ordinarily experienced when a child is separated from a parent or relocates due to inadmissibility. The applicant's husband explained that he wishes for his son to take advantage of the benefits of residence in the United States, yet the applicant has not shown that her son would lack educational opportunities, health care, or financial support in Mexico. Further, 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 (9th 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 (9th 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.

Accordingly, the applicant has not established that her son would experience extreme hardship should the present waiver application be denied. Section 212(h)(1)(B) of the Act.

The applicant has not shown that her husband will experience extreme hardship should she depart the United States and he remain. The AAO acknowledges that the separation of spouses often results in significant emotional hardship, and that the applicant does not wish to be separated from the applicant. Yet, the applicant has not distinguished her husband's emotional hardship from that which is commonly expected when spouses separate due to inadmissibility. The applicant has not asserted or shown that her husband would experience economic challenges should he remain in the United States. It is reasonable that the applicant's husband will have emotional difficulty regarding the residence of his son, whether his son lives with him in the United States separate from the applicant or in Mexico. Yet, unfortunately this is a common challenge of families faced with inadmissibility and does not, without additional distinguishing factors, constitute extreme hardship. *See Hassan v. INS*, 927 F.2d at 468.

The applicant has not shown by a preponderance of the evidence that her husband will experience extreme hardship should he relocate to Mexico to maintain family unity. The applicant's husband asserts that his parents rely on his assistance and support. Yet, the applicant has not submitted evidence to show that her husband's parents in fact rely on his assistance, such as an account of their regular income and expense. While the AAO appreciates that the applicant's husband wishes to assist his parents, the record does not sufficiently reflect that they require his support such that he will suffer significant emotional hardship should he live away from them in Mexico.

The applicant's husband noted that conditions in certain parts of Mexico are difficult. Yet, the applicant has not shown that her husband would be compelled to reside in an area which frequently lacks electricity, water, or food. The applicant's husband expressed that his Spanish language ability is limited, yet the record suggests that he has some experience with Spanish. The applicant has not shown that her husband would be unable to learn sufficient Spanish to allow him to obtain employment and accomplish common tasks in Mexico. It is noted that, should the applicant's husband reside in Mexico, he will not be faced with separation from the applicant or their child. It is further noted that the applicant has not asserted or shown that her husband's parents would be unable to join them in Mexico, or that her husband would be unable to offer support to his parents should he reside abroad.

Based on the foregoing, the applicant has not shown by a preponderance of the evidence that her husband will experience extreme hardship should he relocate to Mexico to maintain family unity. Thus, the applicant has not shown that denial of the present waiver application "would result in extreme hardship" to her husband. Section 212(h)(1)(B) of the Act.

Counsel contends that "[t]he more serious and egregious the act for which forgiveness is sought, the stronger the showing of 'extreme hardship' which must be shown." However, section 212(h)(1)(B) of the Act does not provide for different standards of extreme hardship based on the nature of the applicant's criminal activity. Further, a balancing of positive and negative factors is only relevant when determining whether a favorable exercise of discretion is warranted. 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. The AAO finds that the district director did not erroneously apply the law relating to extreme hardship or commit error in declining to weigh positive and negative factors.

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.