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U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE:

Office: LOS ANGELES (SANTA ANA)

Date: JUN 23 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.

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, Office denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

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 committing a crime involving moral turpitude.

The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship 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 5, 2006. The applicant submitted a timely appeal.

On appeal, counsel states that the applicant stays at home caring for her four U.S. citizen children, who are 10, 9, 5, and 3 years old, while her husband, their sole wage earner, is employed outside the house. Counsel states that the applicant's husband never lived in Mexico and does not speak or write in Spanish. Counsel states that the applicant's children do not know Mexico's culture or language, and that they will experience extreme hardship if they accompany the applicant to Mexico, as shown in the country report describing conditions in Mexico, particularly its daily wage of \$4 to \$5.

The AAO will first address the finding of inadmissibility

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.

On April 18, 1998, in the Superior Court of the State of California for the County of Orange the applicant was charged with three counts: count 1, violation of Cal. Penal Code § 666-484(A)-488M, theft with prior theft conviction, and count 2, violation of § 148.9, falsely representing self to officer; and count 3, violation of § 484-488, petty theft. On July 30, 1998, the applicant entered a plea of guilty to counts 1 and 2. The judge, in part, suspended imposition of the sentence as to both counts and placed the applicant on a three-year informal probation. On July 31, 1998, the applicant entered a plea of guilty to count 3. For that count the judge ordered, in part, that the applicant serve 31 days in the county jail with credit for time served, and complete a special work program in lieu of jail.

Petty theft under California law is a crime involving moral turpitude. *See, U.S. v. Esparza-Ponce*, 193 F.3d 1133, 1135-37 (9th Cir. 1999). Thus, the applicant's two petty theft convictions are crimes involving moral turpitude, rendering her inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude.

It is not necessary for the AAO to address whether falsely representing oneself to an officer is a crime involving moral turpitude as the applicant has already been found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The AAO will now consider whether the applicant's section 212(h) waiver should be granted.

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 U.S. citizen spouse and four U.S. citizen children.

If 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).

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 (BIA) 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 565-566.

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

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's qualifying relative must be established if she or he remains in the United States without him, and alternatively, if she or he joins 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 their separate declarations the applicant and his spouse convey that their family has a close relationship. They state that the applicant's husband financially supports the family by delivering vitamins and supplements for his employer while the applicant stays at home caring for their four children. The applicant's husband states that his job is demanding and that he does not have time to take care of his children. He states that he "could not maintain the family unit without [the applicant] as she provides all the services needed in the home," and that he would experience extreme hardship because he would not "be able to keep my employment and provide the services she provides for the children." The applicant's husband conveys that his children would experience extreme hardship if they remained in the United States without the applicant because they would lose their mother who is also their mentor and care-taker. The birth certificates show the applicant's children and step-children are 13, 12, 8, and 6 years old. The income tax records and W-2 Forms in the file convey that the applicant's husband is the primary income earner in the family; they also indicate that the applicant generates a small income as well. Contained in the record is the Form I-

864, Affidavit of Support Under Section 213A of the Act, dated October 20, 2006. That form shows that the annual income of the applicant's spouse was not sufficient in meeting the poverty line for a family of five.

Courts have stated that "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).

The AAO finds that based on the evidence in the record, the applicant has established that the cumulative emotional effect that family separation would have on her husband, combined with the increased financial and familial burdens that her husband would face if his wife were removed from the United States, render the hardship in this case beyond that which is normally experienced in most cases of removal. Accordingly, the AAO finds that the applicant has established that her husband would suffer extreme hardship if her waiver of inadmissibility application were denied.

Counsel states that if the applicant's children were to accompany her to Mexico they would not know Mexico's culture or language and, based on the country report describing conditions in Mexico, would experience extreme hardship.

United States court and administrative decisions, the AAO notes, have held that the consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. For example, in *Matter of Kao & Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded 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 indicated 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 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.

Based upon the aforementioned decisions, the AAO finds that the applicant's four children, who are of school age and have lived their entire lives in the United States, would suffer extreme hardship if they were to join the applicant to live in Mexico, a country whose language and culture is foreign to them.

The grant or denial of the above waiver does 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 spouse and children, the applicant's employment and payment of income taxes, as shown in income tax and W-2 records, her church attendance, and the passage of approximately 10 years since the applicant's most recent criminal conviction. The unfavorable factors in this matter are the applicant's criminal convictions, her initial entry without inspection and periods of unauthorized presence in the United States.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the laws of the United States, the severity of the applicant's criminal convictions is at least partially diminished by the fact that 10 years have elapsed since her most recent conviction. The AAO finds that the hardship imposed on the applicant's spouse and children 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), 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.