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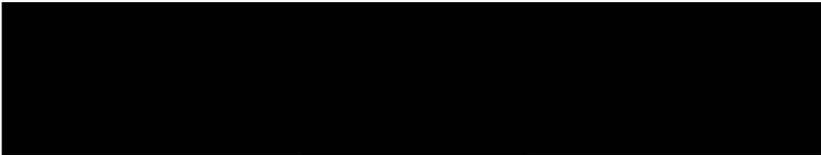
U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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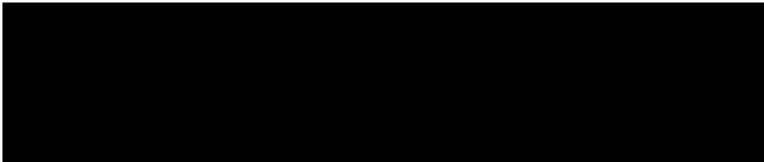
IN RE:



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 District Director, Services, 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 dismissed. The application will be denied.

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 district director concluded that the applicant had failed to establish that her 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, Services*, dated September 29, 2005. The applicant submitted a timely appeal.

On appeal, counsel states that if the applicant's husband moved to Mexico with his wife he would lose his employment, health insurance and home ownership, and his ability to provide for his family because he would not find employment. Counsel further states that the applicant's children who are in kindergarten and second grade would have their education dramatically affected by moving to Mexico. At the same time, counsel states that the applicant's children would experience severe emotional hardship if separated from their mother. Counsel states that the applicant's true character is demonstrated by her school volunteerism, not by a criminal record that shows she was convicted of misdemeanor cruelty to a child. Counsel indicates that the applicant is a loving mother, a devoted housewife, a volunteer, and a student at an adult school, and that the applicant's husband financially supports the family, earning \$18.25 per hour as a dining captain at a country club. According to counsel, the applicant has immediate relatives whose significant ties are in the United States.

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 August 26, 1996, in the Municipal Court of Los Angeles, Van Nuys Judicial District, County of Los Angeles, State of California, the applicant was charged with four counts: count 1 and 3, willful cruelty to child in violation of Cal. Penal Code § 273ab; and counts 2 and 4, inflict injury upon child in violation of § 273d. On January 1, 1997, the applicant entered a plea of guilty and was found guilty of all counts. The judge, in part, suspended imposition of the sentence as to all counts and placed the applicant on summary probation for 36 months.

The applicant was convicted of violating Cal. Penal Code § 273d. That section reads, in part, 'Any person who willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for not more than two years or in the county jail for not more than one year.'

In regard to her conviction under Cal. Penal Code § 273ab, that section states, in part, 'Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life.'

Violation of § 273d of the California Penal Code in *Guerrero de Nodahl v. I.N.S.*, 407 F.2d 1405 (9<sup>th</sup> Cir. 1967), was ruled by the Ninth Circuit to involve moral turpitude because "inflicting 'cruel or inhuman corporal punishment or injury' upon a child is so offensive to American ethics that the fact that it was done purposely or willingly (the California definition of 'willful') ends debate on whether moral turpitude was involved." *Id.* at 1406-1407.

Based on the ruling in *Guerrero de Nodahl*, the applicant's offense under Cal. Penal Code § 273d involves moral turpitude. Because violation of that section involves moral turpitude, it is not necessary for the AAO to address whether section 273ab of the California Penal Code involves moral turpitude.

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 three 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.

With regard to living in Mexico, the applicant's husband states that that he would have difficulty obtaining employment, he would not have health insurance for his family, and his two children who attend school would lose the opportunity to continue their education in the United States. In the record before the AAO, the birth certificates show the applicant's children are presently 4, 9, and 11 years old. School records convey that their oldest child is doing well in school.

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 (5<sup>th</sup> 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 two children who attend school 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.

In regard to remaining in the United States without the applicant, in his declaration dated October 25, 2005, the applicant's husband indicates that his wife takes care of their children while he works at a country club. North Ranch Country Club's employment letter reflects that the applicant's husband earns \$18.25 per hour and has worked there since December 8, 1995. Contained in the record are copies of health insurance cards. The property deed shows the applicant and her husband own a house. In her declaration the applicant conveys that her criminal conviction is an embarrassment and misrepresents her character as she has always been a caring wife, a loving mother, and in service to others. Parent volunteer certificates are contained in the record; they show the applicant has been a school volunteer in the Early Childhood Education Division School Readiness Language Development Program.

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).

In light of the tender ages of the applicant’s children, who are 4, 9, and 11 years old, and based on the letters from Canoga Park Elementary School, which demonstrate that the applicant has been actively involved in her children’s education through her participation in the School Readiness Language Development Program and her attending parent education classes, the AAO finds that the applicant has demonstrated that her children would experience extreme hardship if they were separated from her.

The applicant has established extreme hardship to her children if they were to join her to live in Mexico, and alternatively, if they were to remain in the United States without her. Thus, extreme hardship to a qualifying family member for purposes of relief under 212(h) the Act, 8 U.S.C. § 1182(h), has been established.

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. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). In evaluating whether relief is warranted in the exercise of discretion, the factors adverse to the alien may include the nature and underlying circumstances of the removal ground at issue:

[T]he presence of additional significant violations of this country’s immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien’s bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country’s Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien’s good character (e.g., affidavits from family, friends and responsible community representatives).

*See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must:

[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.

*Id.* at 300. (Citations omitted). The favorable factors in this matter are the extreme hardship to the applicant's spouse and children, her volunteerism, her home ownership, her residing in the United States since 1995, and the passage of 12 years since her criminal convictions. The AAO notes that the record does not indicate that the applicant has any criminal convictions since August 1996.

The adverse factors in this matter are the applicant's criminal convictions for willful cruelty to child (two counts) and inflict injury upon child (two counts). The nature and seriousness of the applicant's offense is described in the arrest report. That report states that the parents of a seven-month-old infant had hired the applicant as a babysitter for their infant in their home five days a week. The parents had installed a system to videotape the applicant with their infant after discovering three fingernail marks on their infant's left arm. The videotape showed the applicant physically abusing the infant, pulling her hair, hitting her with a remote controller, and shaking her head.

Based upon the egregious and willful nature of the applicant's crime, the physical abuse of a seven-month-old infant, the AAO finds that the hardship imposed on the applicant's spouse and children as a result of her inadmissibility fails to outweigh the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is not 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 not met that burden. Accordingly, the appeal will be denied.

**ORDER:** The appeal is dismissed. The waiver application is denied.