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Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

HL2



FILE:



Office: LOS ANGELES

Date:

**MAR 17 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:

SELF-REPRESENTED

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

The applicant is a native and citizen of Mexico who has resided in the United States since June 21, 1992, when she entered without inspection. She was found to be inadmissible under 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 (burglary and petty theft). The applicant is married to a Lawful Permanent Resident and is the beneficiary of an approved Petition for Alien Relative. 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 with her husband and children.

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 June 3, 2006.

On appeal, the applicant asserts that her husband and son would suffer extreme hardship if she is removed from the United States because their son suffers from autism and needs much support and assistance. The applicant's husband states that he works full time to support the family financially, and the applicant provided the care their autistic son needs and also cares for their other children. *Declaration of [REDACTED]* dated July 25, 2006. The applicant's husband further states that it would be difficult for him to support his family if he relocated to Mexico, that he has no relatives there, and that after living in the United States for more than 20 years, it would be difficult for him to adjust to life there. *Id.* In support of the appeal and waiver application the applicant submitted the following documentation: Letters from the applicant and her husband, a letter from the applicant's son's pediatrician, a letter from a clinical psychologist concerning the applicant's son, letters and records from the applicant's son's school, and copies of birth certificates for the applicant's three children. The entire record was reviewed and considered in rendering this decision.

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

(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) states in pertinent part:

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-

(1)(A) [I]t is established to the satisfaction of the Attorney General 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

(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.

The applicant was convicted of burglary on September 30, 1989 and petty theft on December 19, 1996 in Orange County, California. The offense for which the applicant was last convicted took place on April 14, 1996. Since less than fifteen years has passed since the conduct for which the applicant was last convicted, she is not eligible for a waiver under section 212(h)(1)(A) of the Act, but may seek a waiver under section 212(h)(1)(B) of the Act.

Section 212(h) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). The AAO notes that the district director erred in determining that the applicant was required to show extreme hardship to a citizen or permanent resident spouse or parent, and not independently considering hardship to the applicant's children, who are also qualifying relatives for a waiver under section 212(h) of the Act.

*Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors 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.

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 (9<sup>th</sup> 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 children 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.

The record reflects that the applicant is a forty-seven year-old native and citizen of Mexico who has resided in the United States since June 1992, when she entered without inspection. The record further reflects that the applicant’s husband, whom she married on June 23, 1997, is a forty-five year-old native and citizen of Mexico and Lawful Permanent Resident. The applicant currently resides in Santa Ana, California with her husband and their three children.

The applicant’s husband states that their eleven year-old son is autistic and requires constant care, which is currently provided by the applicant. *Declaration of [REDACTED]* He further states that he supports the family by working eight-hour shifts and overtime, and therefore cannot provide the care needed by [REDACTED] and their other children. *Id.*

In support of these assertions the applicant submitted a letter from a clinical psychologist stating that [REDACTED] has been diagnosed with Autistic Disorder of Childhood and Attention Deficit Hyperactivity Disorder, “has marked difficulty in his receptive and expressive speech and language development,” and “is functioning at a level significantly below age expectancy.” *Letter from [REDACTED]* dated July 18, 2006. The letter further states:

He is currently enrolled in an [sic] special education program . . . . The family reported that [REDACTED] was placed in an intensive/ extensive special education program subsequent to our clinical evaluation of 2002. Over the years, he reportedly has made considerable progress and growth in multiple spheres yet maintains his eligibility for special education due to significant developmental disabilities. . . . He currently resides with his intact family which includes three siblings in the Santa Ana area. This is a family unit which has consistently provided support and positive advocacy for their son. [REDACTED] is a developmentally challenged child who will require the continued special education services through the Santa Ana Unified School District . .

A letter from [REDACTED] service coordinator at the Regional Center of Orange County states that he attends a school with a special education program for children with disabilities. The letter states, [REDACTED]’ school program is specifically geared to provide an education that is appropriate for his level

of cognitive ability.” *Letter from* [REDACTED], dated July 11, 2006. A letter from an Instructional Assistant/ Counselor who has worked with [REDACTED] on a one-to-one basis at his school states:

I have worked with [REDACTED] and his family for a year and throughout that year I have witnessed all the wonderful things they do for their child. . . . It is hard to raise a Special Child [sic] Specially one that has been diagnosed with Autism. . . . From what I have observed this year [REDACTED] is an individual who has been nurtured and taken care of since birth. [REDACTED] herself is a magnificent parent, she is always there for [REDACTED] and goes to every school function and activities. *Letter from* [REDACTED] dated July 12, 2006.

The record also contains school records for [REDACTED], including an Individualized Education Program (IEP) from the Santa Ana Unified School District, a Behavioral Intervention Plan from the Special Education Department, and a Multidisciplinary Team Report assessing his eligibility for special educational programs. These documents indicate that his assessment, which included observation and testing by school psychologists, teachers, and a speech pathologist, is consistent with a diagnosis of autism and demonstrated his continued eligibility for special education programs and support services. *See Individualized Education Program (IEP) from the Santa Ana Unified School District, Behavioral Intervention Plan from the Special Education Department, and Multidisciplinary Team Report dated November 3, 2005.* As of June 2006, the one-on-one support for [REDACTED] by an Instructional Assistant was reduced from full-time to two hours per day in his classroom. *See Addendum to IEP dated June 6, 2006.*

Documentation on the record indicates that the applicant’s husband is employed as tire technician and earned approximately \$38,000 in 2005 and \$39,000 in 2004, while the applicant did not work outside the home. *See Joint Income Tax Returns for 2005 and 2004 and letter from the applicant’s husband’s employer dated February 27, 2006.*

Upon a complete review of the evidence on the record, the AAO finds that the applicant has established that her son [REDACTED] would experience extreme hardship if she is removed from the United States and he is separated from her, or if he relocated to Mexico. The evidence on the record indicates that the applicant’s son is autistic and suffers from Attention Deficit Hyperactivity Disorder and learning disabilities, and requires special education and various support services. The evidence further indicates that the applicant is primarily responsible for caring for [REDACTED] and is actively involved in coordinating with his school and other service providers to ensure her son receives the education and support he needs. The evidence on the record further indicates that the applicant’s husband would have great difficulty providing the care [REDACTED] and his other children need while working full-time to support the family financially. Further, as noted above, separation from close family members is a primary concern in assessing extreme hardship, and [REDACTED] and the other qualifying relatives would suffer emotional hardship if they remained in the United States and the applicant were removed to Mexico. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9<sup>th</sup> Cir. 1998).

The evidence on the record, including school records and a letter from a clinical psychologist, further indicates that [REDACTED] has shown great improvement as a result of the special educational program and related support services he receives, but will continue to require these services on a long-term basis. It does not appear that the type of education and support he is receiving in the United States would be available in Mexico, and the removal of [REDACTED] from this special education program, combined with the emotional hardship of removing him from the United States, where he has lived his entire life, and the financial hardship caused by a reduced standard of living in Mexico, would amount to extreme hardship if the family relocated to Mexico to reside with the applicant.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for section 212(h) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factor in this case is the applicant's illegal entry and her convictions for theft and burglary, as well as a 1990 conviction for hit and run resulting in property damage. The positive factors in this case include the applicant's significant family ties to the United States, including her husband and three sons; hardship to the applicant's family members, in particular her youngest son, if she is removed from the United States; letters and other documentation indicating that she is actively involved in ensuring her son receives the educational and support services he needs; and the length of time that has passed since her most recent criminal offense in 1996.

Although the applicant's crimes cannot be condoned, the positive factors in this case outweigh the negative factors.

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 remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden that she merits approval of her application.

**ORDER:** The appeal is sustained.