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U.S. Citizenship and Immigration Services  
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U.S. Citizenship  
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07 2009

FILE: [REDACTED] Office: LOS ANGELES, CALIFORNIA Date:

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the  
Immigration and Nationality Act, 8 U.S.C. section 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, 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, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico. He was found to be inadmissible to the United States 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 a Crime Involving Moral Turpitude (CIMT). The applicant is the husband of a U.S. citizen and the father of two U.S. citizen children. 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.

The District Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on December 17, 2004.

On appeal, counsel asserts that sufficient evidence has been provided to establish that the applicant's wife and children would suffer extreme hardship if the applicant were excluded from the United States.

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) of the Act provides, in pertinent part, that:

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

....

- (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 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 the applicant was convicted of California Penal Code section 459, Burglary, a felony, on February 15, 1995, in the Superior Court of Los Angeles, Southeast Judicial District, and sentenced to 270 days in the County Jail and three years probation. The record also reflects that the applicant was convicted of California Penal Code section 496.1, Receiving Stolen Property, a misdemeanor, on November 9, 1994, in the Municipal Court of Los Angeles, Van Nuys Judicial District, California. Thus, the District Director concluded that the applicant had been convicted of

two Crimes Involving Moral Turpitude, and was inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). The applicant does not contest these findings.

To qualify as a Crime Involving Moral Turpitude for purposes of the Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. *Matter of Cristoval Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). A statute under which an applicant has been convicted must be evaluated for the realistic probability that it could be applied to reach conduct that does not constitute moral turpitude. *Id.* at 698, (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). If the statute has not been applied in such a manner it is reasonable to conclude that all convictions under the statute may be categorized as crimes involving moral turpitude. *Id.* at 697. In the event that the statute has been applied to conduct that does not involve moral turpitude, United States Citizenship and Immigration Services (USCIS) may then rely on an examination of the record of conviction to determine if the applicant's conduct involved a crime of moral turpitude. *Id.* at 698. If the record of conviction does not clearly establish conduct involving moral turpitude, USCIS may then examine any additional evidence deemed necessary to determine the nature of the conduct involved. *Id.* at 698. In all such inquiries the burden is on the alien to establish "clearly and beyond doubt" that, despite a conviction under the statute in question, his or her conduct did not involve moral turpitude. *Matter of Cristoval Silva-Trevino*, 24 I&N Dec. 687, at 709 (A.G. 2008)(citing *Kirong v. Mukasey*, 529 F.3d 800 (8<sup>th</sup> Cir. 2008)).

The AAO notes that the Board of Immigration Appeals (BIA) has found a conviction under California Penal Code section 459 to be a Crime Involving Moral Turpitude. *In the Matter of Z-----*, 5 I&N Dec. 383 (BIA 1953)(concluding that section 459 California Penal Code was a crime of moral turpitude); *Matter of Leyva*, 16 I & N Dec. 118 (BIA 1977) (Referring to section 459, California Penal Code). Thus, the applicant's conviction under this section constitutes a Crime Involving Moral Turpitude and the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. As the record clearly establishes the applicant has been convicted of a crime of moral turpitude, an analysis of Receiving Stolen Property constituting a Crime Involving Moral Turpitude is not necessary.<sup>1</sup>

A waiver of inadmissibility under section 212(h) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse, parent or child of the applicant. Hardship to the applicant is not directly relevant to the determination of extreme hardship under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's U.S. citizen spouse and children are the qualifying relatives in this proceeding. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(i) of the Act; *see also 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 set forth a list of non-exclusive factors

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<sup>1</sup> As the applicant was sentenced to serve more than six months in country jail, the applicant's conviction for burglary is not subject to the petty offense exception in section 212(a)(2)(A)(ii) of the Act.

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 566.

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).

U. S. courts have stated, “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). As this case arises within the jurisdiction of the 9<sup>th</sup> Circuit Court of Appeals, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she relocates with the applicant or remains in the United States, as a qualifying relative is not required to reside outside the United States based on the denial of the applicant’s waiver request.

On appeal counsel for the applicant asserts that any extreme hardship determination must be made in light of the crimes for which an alien has been convicted. However, counsel has misinterpreted the case law cited in his brief. A determination of extreme hardship is not conversely related to “the seriousness of an alien’s crime.” The guiding precedent for establishing extreme hardship is *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999), discussed above. If a determination of extreme hardship is found then USCIS will weigh the positive and negative factors in the exercise of discretion to grant or deny a waiver application.

The AAO now turns to a consideration of the record, which includes, but is not limited to, the following evidence:

1. Statement from the applicant asserting that his wife will suffer extreme hardship if he is not there to help raise his daughter.
2. Statement from the applicant’s wife asserting she will suffer extreme hardship if the applicant is not there to help raise their daughter.
3. Psychological evaluation of the applicant’s wife.

4. Court records for the applicant's arrests.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

On appeal, counsel asserts that the applicant's wife will suffer extreme hardship if the applicant is not present in the United States to help raise their daughter as the applicant's wife will not be able to care for and educate her child or provide her with the necessities of life. The applicant also contends that his wife will suffer extreme depression and anxiety if he is not allowed to remain in the United States and the applicant's spouse echoes this same assertion. In support of the claim that the removal of the applicant would result in extreme emotional hardship for his wife, the record contains a psychological evaluation prepared by licensed psychologist, [REDACTED]. In his evaluation, [REDACTED] reports information provided by the applicant's wife during his interviews with her and the applicant, specifically that the applicant rescued her from a state of severe depression, that she has suffered from depression since childhood and from post-partum depression after the birth of her child who often has ear infections, that she experiences night terrors, nightmares, insomnia, crying spells, nervousness and depression, and that she would lose her home and car if the applicant is returned to Mexico. The applicant's wife also reported that she suffers from back pain and cannot lift her baby, that the applicant performs all the household chores, and that she and the applicant want to have at least two more children, which would not be possible if the applicant resides in Mexico. Based on his interviews with the applicant's spouse and additional psychological testing, [REDACTED] diagnoses the applicant's spouse with "major depression, single episode, severe" as a result of her possible separation from the applicant. If the applicant is excluded from the United States, [REDACTED] concludes, his wife's mental state will further deteriorate, and that it would be "inhumane" to separate this couple and break the family apart. [REDACTED] does not indicate what impact relocation to Mexico would have on the mental health of the applicant's spouse.

Although the input of any mental health professional is respected and valuable, the AAO notes that [REDACTED] relies heavily on facts stated by the applicant and his wife in reaching his conclusions concerning the impact of separation on her mental status, many of which are not established by the record. The record does not contain documentation that establishes the applicant's spouse has suffered from depression since childhood or that she previously suffered from post-partum depression following the birth of her daughter, that she has a back problem that requires the applicant to perform all the household chores, that her daughter has medical problems that require constant medical care,<sup>2</sup> or that without the applicant's income she would lose her home and car. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the evaluation is of diminished value in determining that the applicant's spouse would suffer extreme emotional hardship if she and the applicant were separated. As the evaluation also fails to address how relocation would affect the applicant's spouse's mental health, the AAO finds it to be insufficient

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<sup>2</sup> The AAO notes that the applicant's spouse asserts, in her June 12, 2003 statement, that she and the applicant have two daughters and that she would find it difficult to care for two children in the applicant's absence. While the record indicates that the applicant has a daughter from a prior relationship, the record fails to establish that this child lives with the applicant and his spouse.

proof that the applicant's spouse would suffer extreme emotional hardship if the applicant's waiver application were to be denied.

With regard to the applicant's spouse's claim that she would lose her home and car if the applicant were removed to Mexico, the AAO finds the record to contain insufficient documentary evidence to establish her financial status in the applicant's absence. Although the record contains proof of the applicant's spouse's income, it does not document her financial obligations, including mortgage and car payments. Further, the record does not contain documentation, e.g., published country conditions reports, that demonstrate that the applicant would be unable to obtain employment in Mexico and financially assist his family from outside the United States. As previously noted, claims unsupported with documentary evidence are insufficient to meet the applicant's burden of proof. *Id.* Accordingly, the record does not establish that the applicant's spouse would experience extreme hardship if the applicant's waiver application were denied and she remained in the United States.

Extreme hardship must also be established if the applicant's spouse and/or children relocate with him to Mexico. Counsel for the applicant asserts that the applicant's spouse has spent her entire life in the United States, has never lived in Mexico, has no work experience in Mexico and that all of her immediate family live in the United States. Counsel indicates that the evaluation prepared by Dr. [REDACTED] discusses the extreme hardship that would be suffered by the applicant's family in Mexico. While [REDACTED] reports that the applicant's spouse informed him that relocation to Mexico would be an extreme hardship for her, he does not address how relocation would affect her mental status. He does assert that the applicant has no contacts in Mexico and would, therefore be unable to find a job and support his family from Mexico. The record, however, does not support this claim. As previously noted., the applicant has submitted no documentary evidence to establish that the applicant would be unable to obtain employment in Mexico and contribute to his family's finances from outside the United States. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *Id.* Therefore, the record does not establish that relocation to Mexico would constitute extreme hardship for the applicant's spouse.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's wife faces extreme hardship if the applicant is refused admission. Although the AAO acknowledges that the applicant's spouse and daughter will experience hardships as a result of his inadmissibility, the record fails to distinguish these hardships from those commonly associated with removal and, therefore, they do not, individually or in the aggregate, rise to the level of "extreme" as informed by relevant precedent. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). 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. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse and/or children as required by section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests 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.