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



U.S. Citizenship
and Immigration
Services

H/2

FILE:

Office: DENVER

Date:

MAY 19 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).

A handwritten signature in black ink that reads "Michael Shumway".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Denver, Colorado, denied the waiver application that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico, the husband of a United States citizen, and the beneficiary of an approved Form I-130 petition. The applicant was found to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act) 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 reside in the United States with her husband.

The district director concluded that the applicant had not demonstrated that denial of the waiver application would result in extreme hardship to a qualifying relative as described in section 212(h) of the Act. The application was denied accordingly.

On appeal, counsel asserted that the crimes of which the applicant was convicted were not crimes involving moral turpitude, and that the district director had failed to consider the evidence pertinent to the hardship that denying the application would cause to the applicant's husband.

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

(i) In general. – Except as provided in clause (ii), any 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].

(ii) Exception. – Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age . . . or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The applicant was arrested, on February 15, 2002, in Westminster, Colorado, for a violation of Westminster Municipal Code 6-3-1(a), theft less than \$500. On March 27, 2002 the applicant pleaded guilty to that offense. The applicant was placed on deferred judgment for 12 months. On November 28, 2005, when the applicant had failed to comply with the terms of her deferred

judgment, the case was reopened and the applicant was found guilty of the theft offense. ([REDACTED]

On January 20, 2005, the applicant was arrested, in Thornton, Colorado, for a violation of Thornton Municipal Code 38-176, shoplifting. On February 24, 2005, the applicant was convicted of that offense, pursuant to her plea of guilty. [REDACTED]

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.").

The Westminister, Colorado Municipal Code provides, at 6-3-1(a),

It shall be unlawful to commit theft. A person commits theft when he knowingly obtains or exercises control over anything of value without authorization, or by threat or deception, where the value of the thing is less than \$500, and

1. Intends to deprive the other person permanently of the use or benefit of the thing of value, or
2. Knowingly uses, conceals, or abandons the thing of value in such a manner as to deprive the other person permanently of its use or benefit, or
3. Uses, conceals, or abandons the thing of value intending that such use, concealment or abandonment will deprive the other person permanently of its use and benefit, or
4. Demands any consideration to which he is not legally entitled as a condition of restoring the thing of value to the other person.

The Thornton Municipal Code provides, at section 38-176, Shoplifting,

(a) *Unlawful actions.*

(1) It is unlawful for any person to conceal or to aid, abet or assist another person to conceal unpurchased goods, products or merchandise that are owned, held or displayed for sale by any retail outlet, store or other mercantile establishment, with the intent to avoid payment therefor.

(2) It is unlawful for any person to knowingly carry away or to aid, abet or assist another person in knowingly carrying away unpurchased goods, products or merchandise that are owned, held or displayed for sale by any retail outlet, store or other mercantile establishment. The carrying away of unpurchased

gasoline or similar products is included within the acts prohibited in this subsection. The definition of the term "carry away" shall include but shall not be limited to the exiting towards the outside of any such retail outlet, store or other mercantile establishment with any such unpurchased goods or exiting the retail outlet, store or mercantile establishment with any such unpurchased goods by going into any adjacent mall area as such exists or may exist in the various shopping complexes in the City.

On appeal, counsel asserted that the USCIS had erred in finding the applicant's crimes involved moral turpitude because they were petty offenses charged under municipal ordinances. Counsel provided no authority for the proposition that crimes which would otherwise involve moral turpitude do not involve moral turpitude when charged under municipal ordinances, and the AAO is aware of no authority for that assertion. The petty offense exception is discussed further below.

Intention to permanently deprive an owner of property is a necessary element under most, but not all, subsections of section 6-3-1(a) of the Westminster, Colorado Municipal Code, and it is not a necessary element under section 38-176 of the Thornton Municipal Code. This office will therefore examine the actions that led to the applicant's convictions in order to determine whether those actions evinced the intention to permanently deprive the owners of the goods taken.

A police report dated February 15, 2002 states that the reporting officer was monitoring surveillance cameras in a Westminster, Colorado department store, and that a store employee brought a woman to his attention because she was carrying six pairs of jeans and the store employee believed she was preparing to steal them. When the suspected thief went to a portion of the store where the view of her through the surveillance cameras was occluded, the officer left the monitoring booth. Another store employee was running from the store and told him that the suspect had just left the store with the jeans. The woman and two accomplices fled in a truck. The officer radioed for assistance and other officers stopped the truck. When the original reporting officer joined them, he was able to identify the applicant as the suspected thief. A store employee joined them and also identified the applicant as the thief. The truck contained eight pairs of jeans bearing tags from the department store from which they had just been stolen.

The applicant pleaded guilty to stealing those jeans. The circumstances are such that the AAO finds that the applicant intended to permanently deprive the owner of the jeans, rather than to return them at some future time. That conviction is, therefore, a conviction of a crime involving moral turpitude.

Documents pertinent to the January 20, 2005 shoplifting case in Thornton, Colorado indicate that the applicant and an accomplice hid a bag of shrimp in a purse and then exited the store without paying for them. Again, the applicant pleaded guilty to stealing the shrimp, and the circumstances are such as to preclude temporary deprivation of property. The AAO finds that this second offense was also a crime involving moral turpitude.

The record shows that the applicant was born on April 18, 1983. She was therefore over 18 years of age when she committed both crimes. Further, because the applicant was convicted of two crimes involving moral turpitude, she does not meet the requirements for the petty offense

exception as set forth in section 212(a)(2)(A)(ii) of the Act. The AAO finds that because she was convicted of two crimes involving moral turpitude when she was over 18 years old, the applicant is inadmissible pursuant to Section 212(a)(2)(A).

The balance of this decision will pertain to whether waiver of that inadmissibility is available and whether the applicant has demonstrated that waiver of that inadmissibility, if available, should be granted.

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

The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . 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 [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 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 (BIA1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a nonexclusive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

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).

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).

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, son, or daughter of the applicant. Hardship to the applicant is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's husband is the only qualifying relative in this case. If extreme hardship to a 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).

On an attachment to the Form I-290B appeal, counsel stated that USCIS failed to accord meaningful consideration to statements made by the applicant's husband. The record contains a letter, dated December 15, 2005, from the applicant's husband.

The applicant's husband stated that he has been married to the applicant for two years, that they would like to start a family, and that being separated from her would be difficult for him. He stated that if he were separated from his wife, he would suffer extreme physical, mental, and emotional hardship if the waiver application were denied.

The applicant's husband offered no evidence of physical hardship, and did not even explain what he meant by physical hardship. The applicant's husband offered no evidence that he would suffer financial hardship due to his wife's removal. He offered no evidence that he is unusually susceptible, or susceptible at all, to mental or emotional hardship. He offered no evidence that his wife's absence would cause him medical hardship of any sort. He offered no evidence that he would be unable to accompany his wife to Mexico and to live with her there.

The record demonstrates that the applicant's husband is concerned about the prospect of the applicant's departure from the United States. Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances.

In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress made plain that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the standard in INA § 212(i), the hardship must be greater than the normal, expected hardship involved in such cases.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish

extreme hardship). “[O]nly in cases of great actual or prospective injury . . . will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship.

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 husband faces extreme hardship if the applicant is refused admission. Rather, the record suggests that he will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States.

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA § 212(h), 8 U.S.C. § 1186(h) and that waiver is therefore unavailable. Because the applicant has been found statutorily ineligible, the AAO need not address whether the applicant merits waiver as a matter of discretion.

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 rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met her burden.

ORDER: The appeal is dismissed.