



U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: NEW YORK, NEW YORK Date:

MAY 27 2009

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[REDACTED]

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 waiver application was denied by the District Director, New York, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Ecuador 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 a crime 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 with her husband and children in the United States.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated June 13, 2006.

Counsel filed a timely appeal to the AAO. On July 16, 2007, the district director, having construed the appeal as a motion to reopen and reconsider, denied the motion.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and her husband, [REDACTED] indicating they were married on May 15, 1984; a copy of [REDACTED] naturalization certificate; copies of birth certificates for the couple's oldest child, who was born in Ecuador, and for their four U.S. citizen children; copies of tax documents; a copy of the couple's cable bill, checking account statements, and other financial documents; conviction documents; letters from the applicant's and [REDACTED]'s employers; an affidavit from [REDACTED], letters from three of the couple's children; letters of support; a psychological evaluation for [REDACTED] photos of the applicant and her family; and an approved Immigrant Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

As an initial matter, the AAO notes that the district director lacked jurisdiction to construe the applicant's appeal as a motion to reopen and reconsider and make an unfavorable decision. *See* 8 C.F.R. § 103.3(a)(2). Accordingly, the July 16, 2007 decision of the district director is withdrawn.

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:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (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 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

In the instant case, the record shows that the applicant entered the United States in March 1985 using a visitor's visa. The record further indicates that the applicant has been convicted several times of petit larceny in the New York District Court of Nassau County – Hempstead, in violation of New York Penal Law § 155.25, including on: April 26, 1991, and sentenced to three years probation; May 22, 1992, and sentenced to 70 days imprisonment; and March 30, 1998, and sentenced to 15 days imprisonment.

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. However, the AAO notes that the petit larceny in violation of York Penal Law § 155.25 is not a divisible statute. Moreover, petit larceny has long been held to be a crime involving moral turpitude. See *Briseno-Flores v. Att'y Gen. of U.S.*, 492 F.3d 226, 228 (3d Cir. 2007) (guilty plea to petty theft was a crime involving moral turpitude) (citing *Quilodran-Brau v. Holland*, 232 F.2d 183, 184 (3d Cir. 1956) ("It is well settled as a matter of law that the crime of larceny is one involving moral turpitude regardless of the value of that which is stolen"), and *Matter of Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974) ("It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude"). Therefore, the record shows, and counsel does not contest, that the applicant is inadmissible under section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), for having committed a crime involving moral turpitude.

A section 212(h) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. 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-Morales*, 21 I&N Dec. 296 (BIA 1996).

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 under 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.

In this case, there is insufficient evidence that the applicant's husband or children would suffer extreme hardship as a result of the applicant's waiver application being denied.

states that since his wife joined him in the United States in March of 1985, they have lived together in the County of Nassau, New York. claims his wife has always taken care of their five children while he has worked to support the family. He states that he and his children will be greatly affected if the applicant departed the United States as they are dependent on her in all aspects of their lives. He states his wife has learned from her mistakes in the past and has taken steps towards rehabilitation by attending a program at the Hispanic Counseling Center. In addition, states that when his daughter had an accident and was badly scarred, his wife was there for her during those hard times. He claims his daughter would be devastated if her mother left the country. Mr. claims all of their children count on the applicant to take care of them and to provide them with guidance and emotional support. He states his wife is the fabric that holds their family together and that if she is forced to leave, the fabric would be ripped. *Affidavit of* , dated February 16, 2006.

Three of the couple's children wrote letters in support of their mother. They state that they love their mother very much, that she gives them advice on many things such as the importance of getting a good education, and that she gives them loving care. They further state that their mother has taught them that stealing is wrong and that she has learned from her past mistakes. They claim their mother would die if she were separated from her family. The couple's fourteen-year old daughter, , also states that, "when [she] had [her] accident where [she] was scarred for life on [her] face and legs," her mother was her best friend, helping her overcome her bad feelings. also states that she and her siblings do not want to move to Ecuador because their father would have to stay in the United States to work. states that her mother's sister lives in Ecuador and is always saying how bad things are in Ecuador. states that she and her siblings would not be able to attend school in Ecuador and would not have the things that they have here in the United States. *Letters from* and , dated February 16, 2006.

A letter in the record from the Hispanic Counseling Center states that the applicant "received counseling at this agency from December 6, 1997 to April 22, 1999 when [she] successfully completed the program." *Letter from* , dated February 10, 2006. Letters of support in the record describe the applicant as a good mother who has learned from her past mistakes. *Letter from* , dated February 17, 2006 (letter from the applicant's brother-in-law stating the applicant is a great mother); *Letter from* , dated February 16, 2006 (describing the applicant as a dedicated mother and wife); *Letter from* , dated February 15, 2006 (letter from the applicant's

pastor stating that the applicant is a “conscientious, reliable and a very honest wom[a]n”); *Letter from [REDACTED]*, dated February 14, 2006 (stating the applicant is “a hard working woman . . . dedicated to her spouse and kids”).

A psychological report in the record states that four of the couple’s children attend public schools, a school system that has had “severe difficulties” with violence, gang wars, and disciplinary problems. The report states that the couple’s second oldest child, a senior in high school, has had “marginal” school performance and has uncertain future plans. The report states that [REDACTED] is currently attending summer school because she failed many subjects during her freshman year of high school. The report states that the two youngest children, who were in middle school and pre-K, are doing well in school. The report states that the applicant participates in teacher conferences and other school-related activities as [REDACTED] works long hours. The report also states that the children describe the applicant at the “emotional backbone of the family.” The report contends the children express overwhelming feelings of terror, anxiety, and loss should the applicant leave the United States, and that it would be an “unimaginable torment” for them all. The report concludes that the applicant “is the emotional, psychological, and nurturing parent in this family system,” and that the applicant’s departure would result in extreme hardship to all qualifying family members, particularly considering that the family lives in a “vulnerable” community.

Although the AAO recognizes [REDACTED] and the couple’s children will suffer hardship as a result of the denial of the applicant’s waiver application and is sympathetic to the family’s circumstances, after a careful review of the record, there is insufficient evidence that the hardship they will suffer rises to the level of extreme hardship. Although the record indicates the applicant is a nurturing mother of five children who range in age from six years old to twenty-four years old, it is not evident from the record that their situation rises to the level of extreme hardship. Rather, if [REDACTED] and his children decide to stay in the United States without the applicant, their situation is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship based on the record. The Board of Immigration Appeals and the Courts of Appeals have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. *See also Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991) (uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported).

Significantly, [REDACTED] does not mention the possibility of moving back to Ecuador, where he was born, to avoid the hardship of separation, and does not address whether such a move would represent a hardship to him or the couple’s children. Only the couple’s fourteen-year old daughter, [REDACTED] discusses the reasons her family cannot move to Ecuador. However, her claim that her father must stay in the United States to work is not based on any record evidence indicating he could not

obtain employment in Ecuador. In addition, claim that she and her siblings could not go to school in Ecuador is also unsupported by the record.

To the extent the record indicates that [REDACTED] had an accident and that the applicant was instrumental in assisting [REDACTED] after the accident, there are no specific details regarding this incident. It is unclear what happened to [REDACTED], when the accident happened, or whether she continues to require her mother's assistance for follow-up care and treatment. In short, there is no indication that [REDACTED] or any qualifying relative, has a medical condition that should be considered in the extreme hardship determination.

Regarding the psychological report in the record, the AAO notes that although the input of any mental health professional is respected and valuable, the psychological report is based on two interviews the Social Worker conducted with the family on June 29, 2006, and July 7, 2006. The record fails to reflect an ongoing relationship between a mental health professional and a qualifying relative. Moreover, the conclusions reached in the report, being based on merely two interviews, do not reflect the insight and elaboration commensurate with an established relationship with a mental health professional, thereby rendering the therapist's findings speculative and diminishing the evaluation's value to a determination of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's husband or children caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains 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 July 16, 2007 decision of the district director is withdrawn. The appeal is dismissed.