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[REDACTED]

FILE:

[REDACTED]

Office: NEW YORK, NY

Date: NOV 25 2009

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. § 1182(h) and under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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).

Perry Rhew

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Peru 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 procured a visa to the United States by fraud or willful misrepresentation. The applicant's spouse and two children are U.S. citizens.¹ The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The director concluded that the applicant had failed to establish eligibility for a section 212(i) waiver and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, at 3, dated February 27, 2008.

On appeal, counsel asserts that the denial was arbitrary, capricious and groundless; the decision is replete with misstatements; and the director is mistaken in stating that the applicant failed to submit an extreme hardship letter from a qualifying relative. *Form I-290B*, at 2, received March 31, 2008.

The record includes, but is not limited to, counsel's brief, the applicant's statements, the applicant's daughter's statement, educational records and certificates for the applicant's son, the applicant's son's teacher's statements, a statement from the parent coordinator at the applicant's son's school, and a medical letter for the applicant. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant stated that she had never been arrested on her July 25, 1991 immigrant visa application. However, the applicant had been arrested on June 29, 1990 and convicted on September 19, 1990 of the crime of shoplifting in violation of New Jersey Statutes Section 2C: 20-11. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The AAO notes that the Supreme Court in *Kungys v. United States*, 485 U.S. 759 (1988) found that the test of whether concealments or misrepresentations were "material" was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service's (now United States Citizenship and Immigration Services (**USCIS**)) decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

¹ The record reflects that the applicant is separated from her spouse and is residing with the father of her son.

A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:

- a. the alien is excludable on the true facts, or
- b. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (AG 1961).

The AAO notes that at the time of the applicant's immigrant visa application, her shoplifting conviction was her only conviction, she was given a \$450 fine (plus court and VCCB costs totaling \$55), and the maximum possible sentence for a conviction under New Jersey Statutes Section 2C: 20-11 in 1990 was six months. Under the true facts, the applicant would have been eligible for the petty offense exception under section 212(a)(2)(A)(ii)(I) of the Act and therefore, she was not inadmissible to the United States at the time she submitted her visa application. In addition, her misrepresentation did not shut off a line of inquiry that was relevant to her eligibility and that might well have resulted in a proper determination that she be found inadmissible, as the petty offense exception would have applied. Based on the record, the AAO finds that the applicant did not willfully misrepresent a material fact and is not inadmissible under section 212(a)(6)(C)(i) of the Act.

However, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed two crimes involving moral turpitude (the aforementioned shoplifting conviction) and her conviction for fraudulent statements in violation of 8 U.S.C. § 1306(c) and 18 U.S.C. § 2 on or about June 29, 2001.

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

- (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 [now, Secretary, Homeland Security, "Secretary"] 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 [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.

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. Hardship to the applicant is not a permissible consideration in a 212(h) waiver proceeding except to the extent that such hardship may affect the qualifying relative. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals (BIA) deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of lawful permanent resident or U.S. citizen family ties to 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.

The AAO notes that extreme hardship to a qualifying relative must be established whether the qualifying relative resides in Peru or in the United States, as the qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request. The applicant does not make any claims of hardship to her legal spouse.

The first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to Peru. The applicant's daughter states that she will need simultaneous evaluation of a detected breast mass using clinical breast examination, radiography and FNAB; she will not be able to have such a high quality of patient care in Peru; she suffers from asthma and was hospitalized over two years ago due to an asthma attack; she will not be able to abandon her fiancé and child in the United States and it would be impossible for them to move with her to Peru; it will be extremely difficult to find employment, she is the owner of a Peruvian restaurant in New York and her income allows her to maintain a considerable lifestyle for her and her family; she would have a significant chance of being unemployed, being unable to obtain proper medical care and being unable to support her family; the thought of the applicant facing even worse problems in Peru is excruciating for her; and societal discrimination against women in many areas of Peru is pervasive, 69 percent of women report some form of physical violence in their lives, her father was abusive and she is horrified at the thought of returning to such a hostile environment.

Applicant's Daughter's Statement, at 1-4, dated February 25, 2008. The record does not support the applicant's daughter's claims as it fails to include documentary evidence of her health problems; the economic, political or human rights conditions in Peru; her United States citizen son or her ownership of a restaurant business. Going on record without supporting documentation will not 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)). The record does not include sufficient evidence of emotional, financial, medical or other hardship factors that, in the aggregate, establish that the applicant's daughter would suffer extreme hardship upon residing in Peru permanently.

The applicant states that in Peru her son will face intense emotional distress, deprivation of medical care, lack of scholastic opportunity, a threat to his safety and a reduction in his standard of living; her son does not know any other way of life than that in the United States; he will have a hard time adjusting to life in Peru, he hardly speaks Spanish and does not know how to write in Spanish; he will feel frustrated as a result of his inability to understand the language, he is a great student and his education would suffer; he suffers from asthma, he needs to carry and use an inhaler, he has been hospitalized on many occasions and has to see his doctor regularly; he is extremely close to his sister and it would be unbearable to be separated from her; and he will be living in a country that is unsafe and insecure. *Applicant's Statement*, at 1-3, 5, dated February 22, 2008. The applicant's son's teacher states that the applicant's son is doing well academically and pulling him out of his current home will be detrimental to him and his academic success. *First Statement from Applicant's Son's Teacher*, dated November 21, 2007. The parent coordinator at the applicant's son's school states that the applicant's son is mostly proficient in English and that if forced to leave an English-speaking school system at this stage in his education, his academic progress would be severely hindered. *Statement from Parent Coordinator*, undated. The record does not include supporting documentary evidence of the applicant's son's medical problems or of country conditions in Peru. The record reflects that the applicant's son is 12 years old. The Board of Immigration Appeals (BIA) found that a fifteen-year-old child who lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The AAO finds the reasoning in *Kao and Lin* to be persuasive in its evaluation of the record before it and concludes that the applicant's son would experience extreme hardship upon residing in Peru permanently.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative remains in the United States. The applicant's daughter states that she has a very strong bond with the applicant, she has been undergoing systematic physical examination and mammography due to a mass detected in one of her breasts, and a breast mass may lead to cancer; her health concerns are extremely emotionally and physically debilitating and the applicant's support during a regimen of medical visits is particularly important to her; she is at a very high risk of developing breast cancer and she needs to reduce her stress and alter her lifestyle; stress can be related to cancer development; the applicant raised her primarily by herself as her father did not support or live with them, the applicant is the only parent figure that she has had, and she witnessed her father emotionally and physically abuse the applicant; her concerns about the applicant's removal are increased by the fact that the applicant suffers from anxiety and depression, the

applicant receives treatment for her condition, the applicant is required to attend a clinic and take medications, and she is terrified at the thought of the applicant not receiving medical care; she is engaged to be married, her son has developed a strong relationship with the applicant, the applicant helps take care of her son when she attends to her restaurant business, it would be unbearable for her son to be separated from the applicant; and she fears for the applicant to be returned to a country with the aforementioned hostile environment. *Applicant's Daughter's Statement*, at 1-4. As previously noted, the record does not include supporting documentary evidence of the applicant's daughter's medical problems or business. Neither does it document the role that the applicant plays in supporting her, or the emotional hardship that her son would experience as a result of his grandmother's absence and how that would affect her, the qualifying relative. The record reflects that the applicant is receiving mental health treatment; she has been diagnosed with major depressive disorder; she reports anxiety, crying spells and sleep problems; and she is being prescribed several medicines and is being followed monthly. *Letter from [REDACTED]*, dated October 2, 2007. However, it fails to demonstrate, through documentary evidence, how the applicant's mental health problems would affect her daughter upon separation. The record reflects that the applicant's daughter would experience difficulty without the applicant, but it does not include sufficient evidence of emotional, financial, medical or other hardship factors that, in the aggregate, establish that the applicant's daughter would suffer extreme hardship upon remaining in the United States.

The applicant states that her son depends entirely on her for support and care, he has a serious medical condition (asthma), he has been hospitalized on many occasions due to asthma attacks, and taking care of his asthma is an important part of his and her life. *Applicant's Statement*, at 1-2. The applicant's son's teacher states that the applicant's son is in a program for students excelling academically, he is very close to the applicant and worrying about the applicant is taking a toll on him. *Second Statement from the Applicant's Son's Teacher*, dated February 15, 2008. The record does not include evidence of the applicant's son's medical condition or that the father of the applicant's son would be unable or unwilling to care for him. The record does not include sufficient evidence of emotional, financial, medical or other hardship factors that, in the aggregate, establish that the applicant's son would suffer extreme hardship upon remaining in the United States.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). 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. *Hassan v. INS*, *supra*, held further that the 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.

A review of the documentation in the record fails to establish the existence of extreme hardship to a qualifying relative 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(i) 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 appeal is dismissed.