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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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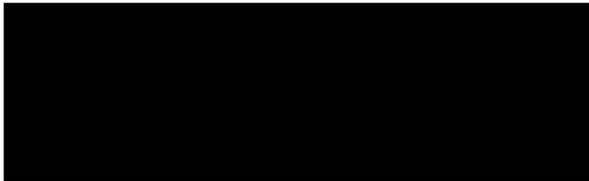
FILE: [REDACTED] Office: SAN FRANCISCO (SACRAMENTO)

Date: OCT 29 2009

IN RE: Applicant: [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)

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).

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Mexico, was found inadmissible to the United States 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 multiple crimes involving moral turpitude. The applicant sought 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 his U.S. citizen spouse and children.

The district director concluded that that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative. **The Application for Waiver of Grounds of Inadmissibility (Form I-601)** was denied accordingly. *Decision of the District Director*, dated September 9, 2005.

In support of the appeal, counsel submits a brief, dated November 21, 2005, and referenced exhibits. The entire record was reviewed and considered in rendering this decision.

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

(A)(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, or

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

(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).

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

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 (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

(2) The Attorney General (Secretary), in his discretion . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Regarding the applicant's ground of inadmissibility, the record reflects that in April 1999, the applicant was convicted of Forgery, a misdemeanor, in violation of section 470(a) of the California Penal Code.¹ The applicant was placed on probation for a period of three years and jail time of 48

¹ Section 470 of the California Penal Code states, in pertinent part:

(a) Every person who, with intent to defraud, signs the name of another person, or a fictitious person, knowing that he or she has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, bond, covenant, bank bill or note, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, lottery ticket or share purporting to be issued under the California State Lottery Act of 1984, trading stamp, power of attorney, certificate of ownership or other document evidencing ownership of a vehicle or undocumented vessel, or any certificate of any share, right, or interest in the stock of any corporation or association, or any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge of any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal,

hours was imposed. In addition, in September 2002, the applicant was convicted of two counts of Annoying or Molesting a Child under 18, a misdemeanor, in violation of section 647.6(a) of the California Penal Code.² The applicant was placed on probation for a period of three years and jail time of 180 days was imposed. The AAO has reviewed the statutes, case law and other documents related to these convictions, as well as the relevant precedent decisions from the Board of Immigration Appeals and the courts. The AAO concurs with the district director that the applicant has been convicted of two crimes involving moral turpitude and is therefore inadmissible under section 212(a)(2)(A)(i) of the Act.³ The applicant is eligible for a section 212(h) waiver of the bar to admission.

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 O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) the BIA held that:

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.

or any acceptance or endorsement of any bill of exchange, promissory note, draft, order, or any assignment of any bond, writing obligatory, promissory note, or other contract for money or other property; or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court or the return of any officer to any process of any court, is guilty of forgery.

² Section 647.6 of the California Penal Code states, in pertinent part:

(a) Every person who annoys or molests any child under the age of 18 shall be punished by a fine not exceeding one thousand dollars (\$1,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.

³ The AAO notes that the applicant does not dispute the district director’s finding that the offenses for which he was convicted constitute crimes involving moral turpitude.

This matter arises in the San Francisco district office, which is within the jurisdiction of the Ninth Circuit Court of Appeals. That court has 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). See also *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (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). Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

The applicant’s U.S. citizen spouse asserts that she will suffer extreme emotional and financial hardship were she to remain in the United States while the applicant relocates abroad due to his inadmissibility. In a declaration she states that she would suffer emotional hardship because “while serving as a member of the Mexican special forces [redacted] [the applicant] infiltrated a group of drug traffickers and turned over evidence to the Mexican Government. The evidence resulted in the arrest and imprisonment of several people. Later his cover was revealed and [redacted] and his parents have received threatening phone calls related to the imprisonment of these people.... I would be emotionally devastated and in fear for his life....” *Declaration from [redacted]*, dated June 30 2005. In addition, the applicant’s spouse notes that her spouse has been the sole financial supporter of the family as she has not worked since July 2002; she contends that she would not be able to pay rent, childcare, bills and groceries on her own and such a situation would cause her extreme financial hardship. *Id.* at 1.

In support of the applicant’s spouse’s declaration, documentation has been provided that confirms that the applicant has been gainfully employed by Burger King since November 1999 and was promoted to General Manager in July 2003. *Letter from [redacted] Brening Enterprises*, dated January 7, 2005. In 2004, the applicant earned over \$25,000. See *Form 1040, U.S. Individual Income Tax Return for 2004*. His income permitted the family to purchase a home. See *Buyers/Borrowers Closing Statement*, dated November 22, 2005. In addition, documentation has been provided confirming the applicant’s membership in a Special Forces unit of the Mexican Army and his participation in antinarcotics operations, and establishing that the applicant’s colleague, who worked with him in the same position, was recently assassinated due to his involvement in antinarcotics operations. See *Letter and Translation from [redacted]* dated October 18, 2005 and *Letter and Translation from [redacted]* dated October 19, 2005

Due to the fears and anxieties with respect to the applicant’s anticipated return to Mexico, in light of his past involvement in antinarcotics operations and the specific threats made against him and his family in Mexico, and the fact that the applicant’s spouse would be required to assume the role of primary caregiver and breadwinner to young children, without the complete emotional and financial support of the applicant, the AAO concludes that the applicant’s spouse would face hardship beyond

that normally expected of one facing the removal of a spouse. As such, were the applicant removed, the applicant's spouse would suffer extreme hardship.

Extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. The applicant's U.S. citizen spouse contends and documents that Mexico is a poor and dangerous country. She notes that her fears of relocating to Mexico would be compounded by her husband's past involvement in antinarcotics operations for the Mexican army. *Supra* at 1. The applicant further states that he would have no job opportunities or medical benefits and his U.S. citizen children would be in danger due to the dramatic increase in kidnappings in Mexico. *Declaration of* [REDACTED] dated June 30, 2005.

Counsel has provided documentation to substantiate the above-referenced problematic country conditions in Mexico. Furthermore, the AAO notes that the U.S. Department of State has issued a Travel Alert for Mexico. As noted by the U.S. Department of State, in pertinent part:

The Department of State has issued this Travel Alert to update security information for U.S. citizens traveling to and living in Mexico. It supersedes the Travel Alert for Mexico dated February 20, 2009, and expires on February 20, 2010.

Recent violent attacks have caused the U.S. Embassy to urge U.S. citizens to delay unnecessary travel to parts of Michoacán and Chihuahua (see details below) and advise U.S. citizens residing or traveling in those areas to exercise extreme caution. Drug cartels and associated criminal elements have retaliated violently against individuals who speak out against them or whom they otherwise view to be a threat to their organization, regardless of the individuals' citizenship. These attacks include the abduction and murder of two resident U.S. citizens in Chihuahua in July, 2009.

Mexican drug cartels are engaged in violent conflict - both among themselves and with Mexican security services - for control of narcotics trafficking routes along the U.S.-Mexico border. In order to combat violence, the government of Mexico has deployed military troops in various parts of the country. U.S. citizens should cooperate fully with official checkpoints when traveling on Mexican highways.

Some recent Mexican army and police confrontations with drug cartels have resembled small-unit combat, with cartels employing automatic weapons and grenades. Large firefights have taken place in towns and cities across Mexico, but occur mostly in northern Mexico, including

Tijuana, Chihuahua City, Monterrey and Ciudad Juarez. During some of these incidents, U.S. citizens have been trapped and temporarily prevented from leaving the area. The U.S. Mission in Mexico currently restricts non-essential travel within the state of Durango, the northwest quadrant of Chihuahua and an area southeast of Ciudad Juarez, and all parts of the state of Coahuila south of Mexican Highways 25 and 22 and the Alamos River for US Government employees assigned to Mexico. This restriction was implemented in light of the recent increase in assaults, murders, and kidnappings in those three states. The situation in northern Mexico remains fluid; the location and timing of future armed engagements cannot be predicted.

A number of areas along the border are experiencing rapid growth in the rates of many types of crime. Robberies, homicides, petty thefts, and carjackings have all increased over the last year across Mexico generally, with notable spikes in Tijuana and northern Baja California. Ciudad Juarez, Tijuana and Nogales are among the cities which have experienced public shootouts during daylight hours in shopping centers and other public venues. Criminals have followed and harassed U.S. citizens traveling in their vehicles in border areas including Nuevo Laredo, Matamoros, and Tijuana.

U.S. citizens are urged to be alert to safety and security concerns when visiting the border region. Criminals are armed with a wide array of sophisticated weapons. In some cases, assailants have worn full or partial police or military uniforms and have used vehicles that resemble police vehicles. While most crime victims are Mexican citizens, the uncertain security situation poses serious risks for U.S. citizens as well. U.S. citizen victims of crime in Mexico are urged to contact the consular section of the nearest U.S. consulate or Embassy for advice and assistance. Contact information is provided at the end of this message.

Although the greatest increase in violence has occurred on the Mexican side of the U.S. border, U.S. citizens traveling throughout Mexico should exercise caution in unfamiliar areas and be aware of their surroundings at all times. Bystanders have been injured or killed in violent attacks in cities across the country, demonstrating the heightened risk of violence in public places. In recent years, dozens of U.S. citizens living in Mexico have been kidnapped and most of their cases remain unsolved.

Based on the documented security concerns for U.S. citizens in Mexico, the substandard economy, and the applicant's past involvement in antinarcotics operations and the threats to his family due to said involvement, the AAO concludes that the applicant's spouse would experience extreme hardship were she to relocate to Mexico to reside with the applicant due to his inadmissibility.

The AAO thus finds that the applicant has established that his U.S. citizen spouse would experience extreme hardship were she to remain in the United States without the applicant and in the alternative, were she to relocate to Mexico to reside with the applicant due to his inadmissibility.⁴ However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse and children would face, the applicant's history of gainful employment, community ties, home ownership, payment of taxes and the passage of more than seven years since the applicant's most recent conviction for a crime of moral turpitude. The unfavorable factors in this matter are the applicant's convictions for crimes of moral turpitude and unauthorized presence and employment in the United States.

The AAO finds that the unfavorable factors, in particular, the applicant's criminal conviction for annoying/molesting a 16 year old child, outweigh the favorable factors in this application. Therefore, a favorable exercise of the Secretary's discretion is not warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, this appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.

⁴ As extreme hardship to the applicant's U.S. citizen spouse has been established, the AAO does not find it necessary to determine whether extreme hardship has been established with respect to the applicant's U.S. citizen children.