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



U.S. Citizenship
and Immigration
Services

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[REDACTED]

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FILE:

[REDACTED]

Office: CLEVELAND (CINCINNATI)

Date: SEP 01 2009

IN RE:

[REDACTED]

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

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, Cleveland, Ohio, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of Ghana 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 committing a crime involving moral turpitude.

The applicant is married to a citizen of the United States. The applicant sought a waiver of inadmissibility pursuant to sections 212(h), 8 U.S.C. § 1182(h), of the Act so as to remain in the United States with her husband. The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, dated June 22, 2007. The applicant submitted a timely appeal.

On appeal, counsel states that the applicant no longer has two convictions. He states that since the Hamilton County Municipal Court expunged her 2004 conviction on April 24, 2006, she has only one crime involving moral turpitude, the July 22, 2005 arrest for stealing chocolates, and he states that the statutory code under which the applicant was convicted imposes a sentence of not more than six-months jail for first-degree misdemeanor and that the petty offense exception therefore applies. In a letter dated July 21, 2008, counsel states that the Butler County Court, Area III, West Chester, Ohio, dismissed the applicant's theft conviction for stealing chocolates, [REDACTED] on June 3, 2008.

The AAO will first address the finding of inadmissibility.

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

(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 . . . is inadmissible.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record reflects that the applicant has two convictions. On September 20, 2004, the applicant was arrested for the theft of a sheet set in violation of 2913.02 of the Revised Code of Ohio, [REDACTED]. A judge convicted her of the charge and placed her on probation. On July 22, 2005, the applicant committed theft in violation of section 2913.02 of the Revised Code of Ohio, a first-degree misdemeanor, [REDACTED]. She was convicted on August 23, 2005, and ordered to pay a fine and costs, serve 30 days in jail, and be placed on probation.

Counsel does not disagree with the director's finding that theft is a crime involving moral turpitude. However, counsel claims that the applicant's convictions no longer render her inadmissible.

The AAO disagrees and finds that the convictions are not eliminated for immigration purposes. In *Sanusi v. Gonzales*, 474 F.3d 341 (6th Cir. 2007), the Court of Appeals for the Sixth Circuit, the jurisdiction wherein the instant case lies, states that in *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006), the Court confirmed the well-established principle of law that the vacation of a conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.

With case number [REDACTED], on April 24, 2006, a judge granted the applicant's application for expungement and sealing of misdemeanor conviction record. In granting the application, the judge stated that she heard the application, the evidence, and arguments of counsel and found the applicant had only one conviction as defined in R.C. 2953.31 and one year had expired since the applicant's final discharge, and that the applicant had been rehabilitated, and the interests of the applicant in having her criminal records sealed were not outweighed by any legitimate governmental needs to maintain such records. *Entry Granting Application for Expungement and Sealing of Misdemeanor Conviction Record Pursuant to R.C. 2953.52*. Although a judge granted the expungement of [REDACTED], the applicant did not submit into the record the application, evidence, and counsel's arguments (the transcript of the hearing), which the judge based her decision upon. Nevertheless, the AAO finds that the judge's entry granting the application suggests that the application was granted due to the expiration of one year, the applicant's rehabilitation, her having only one conviction, and the applicant's interests in sealing her criminal records.

With [REDACTED] the Journal/Judgment Entry conveys that the judge granted the motion to set aside the conviction and dismissed the case. The applicant did not submit into the record, however, any documents pertaining to the motion to set aside the conviction except for the Journal/Judgment Entry, which entry does not indicate the judge's rationale in granting the motion.

The entry of judgment indicates that the expungement was not based upon a procedural or substantive defect in the underlying criminal proceedings.

Based upon the record before the AAO and in light of *Sanusi*, the requisite legal basis is not present in the instant case to effectuate the expungement or setting aside of the applicant's conviction for immigration purposes. Section 291 of the Act, 8 U.S.C. § 1361, states that the applicant bears the burden of establishing eligibility. She is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Section 212(h) of the Act provides, in pertinent part:

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

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's U.S. citizen husband. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 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 (BIA) set forth a list of non-exclusive factors 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 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

In rendering this decision, the AAO has carefully considered all of the evidence contained in the record such as letters, affidavits, wage statements, and other documentation.

As shown in the marriage certificate, [REDACTED] and her husband were married on June 29, 2006. In his affidavit, [REDACTED] the applicant’s husband indicates that he would experience extreme emotional hardship if separated from his wife. He indicates that his wife’s mother and siblings reside in New Jersey and would be impacted emotionally as well. [REDACTED] states in her affidavit that forced separation would negatively impact her husband and emotionally they would both be crushed. The income tax records and wage statement for 2005 show [REDACTED] earning \$33,037 annually, and his employment letter by A&A Safety, Inc., dated August 7, 2006, conveys that he works 45 hours or more each week and has an average paycheck of \$428 each week.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to [REDACTED] must be established if he remains in the United States without his wife, and alternatively, if he joins her to live in Ghana. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

Courts have stated that “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).

However, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it “was not of such a nature which is unusual or beyond that which would normally be expected from the respondent’s bar to admission.” (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). As stated in *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), “[e]xtreme hardship” is hardship that is “unusual or beyond that which would normally be expected” upon deportation and “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991).

The AAO finds the record does not support [REDACTED] assertion that her husband would experience extreme financial hardship if they are separated. [REDACTED] annual income is approximately \$33,000. The residential lease agreement for 2006 indicates that his monthly rent is \$690. His salary is sufficient to cover the costs in the submitted utilities and car insurance invoices. No documentation has been submitted to establish that [REDACTED] salary is insufficient to pay his monthly household expenses.

[REDACTED] is very concerned about separation from his wife. The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of separation from a loved one. After a careful consideration of the record, the AAO finds that [REDACTED] would experience emotional hardship if separated from his wife. However, the hardship in this case is not beyond that which is normally experienced in most cases of removal. Accordingly, the AAO finds that the applicant has not established that her husband would experience extreme hardship if he remained in the United States without her.

The applicant does not contend that her husband would experience extreme hardship if he were to join her to live in Ghana.

Having considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to the applicant's husband if he were to remain in the United States without her, and alternatively, if he were to join her to live in Ghana.

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 remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed. The application will be denied.

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