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U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VIENNA, AUSTRIA Date: SEP 10 2009

IN RE: [redacted]

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

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The application will be approved.

The applicant, , is a native and citizen of Austria 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; and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation.

The applicant is married to a U.S. citizen. The applicant sought a waiver of inadmissibility pursuant to sections 212(h) of the Act, 8 U.S.C. § 1182(h), and 212(i) of the Act, 8 U.S.C. § 1182(h). The OIC concluded that the applicant had failed to establish that his 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 OIC*, dated February 1, 2007. The applicant submitted a timely appeal.

On appeal, counsel states that the OIC failed to properly consider or mischaracterized the submitted evidence of extreme hardship. Counsel states that if joined the applicant to live in Austria, she would be depressed due to separation from her children and grandchildren and her church, she would be heavily taxed on the sale of her house, she would not be able to obtain employment in Austria and would lose her job in the United States, and would have difficulties adjusting to life in Austria. If remained in the United States without her husband, counsel states that would be depressed and the applicant would not be able to help her deal with psychological problems rooted in childhood.

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 from 1993 to 1995, the applicant, for illegal enrichment purposes and with the intent to acquire a continuous income by committing repeated fraud, cheated the Lower Austrian health insurance fund. The applicant was found guilty of committing the crime of serious commercial fraud according to section 146, 147 subsection 2, and 148 sentence 1 StGB of the Austrian Criminal Code, and was sentenced to eight months imprisonment, which was suspended, and was placed on probation for a three-year trial period. The applicant filed an appeal, and his sentence was reduced to seven months imprisonment.

"Fraud, as a general rule, has been held to involve moral turpitude." *See, e.g., Matter of Adetiba,* 20 I&N Dec. 506, 508 (BIA 1992). Because the applicant's crime involved commercial fraud, which is a crime involving moral turpitude, he is 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 . . .

The applicant was also found inadmissible for misrepresentation.

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 record shows that the applicant gained entry into the United States on two separate occasions in 2000 through the visa waiver program. A person must indicate in the I-94W Nonimmigrant Visa Waiver Arrival-Departure Form whether he or she has ever been arrested or convicted of an offense or crime involving moral turpitude. The applicant failed to do so.
Counsel on appeal claims that the applicant is not inadmissible under section 212(a)(6)(C) of the Act because he did not know that commercial fraud is a crime involving moral turpitude. The AAO does not find this persuasive. The Form I-94W asks whether the applicant has ever been arrested or convicted of an offense **or** a crime involving moral turpitude. [Emphasis added] In other words, they are required to respond yes if they have ever been arrested or convicted of any offense, whether or not a crime involving moral turpitude. The applicant knew that he had been convicted of an offense, his knowledge of whether it was a crime involving moral turpitude is irrelevant. In light of the record before the AAO, the record supports the finding that the applicant willfully misrepresented the material fact of his criminal record in his application for admission into the United States. He is therefore inadmissible under section 212(a)(6)(C) of the Act.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states that:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Since the applicant is eligible for a waiver of inadmissibility under sections 212(h) and 212(i) of the Act, this decision will apply to both waivers.

A waiver under section 212(i) of the Act requires the applicant to show that the bar to admission imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant and to his or her child are not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(i) of the Act. In determining hardship here, the AAO must apply the higher hardship standard of 212(i) and will only consider hardship to his spouse. Thus, hardship to the applicant and his U.S. citizen step-daughters will be considered only to the extent that it results in hardship to , the applicant's U.S. citizen spouse. 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 support of the waiver application, the record contains a psychiatric evaluation report; a medical certificate, employment letters; a country report on Austria; letters from the applicant and Ms. and her children, pastor, and friends; medical records; and other documents.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to must be established if she remains in the United States without her husband, and alternatively, if she joins the applicant to live in Austria. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

With regard to emotional state, the record contains a psychiatric evaluation report dated February 20, 2007, by and Their report relates the following. initially planned to live with her husband in Austria, but had difficulty with the language, with finding employment, with her living conditions, in being unable to attend the church of her choice, and with separation from her children. began to feel depressed and returned to the United States in December 2006 for the birth of her grandchild. She is living with her daughter, step-son, and grandchild in California, and works as a substitute teacher although she had worked as a software engineer. had been molested as a child at the age of ten by a cousin and that her mother had known of the molestation and did not protect her. Ms. had symptoms of depression, hurt, and anger; and has been coping with her hurt and anger with ever since. husband has been her primary source of support as she sorts through her feelings. unsuccessfully attempted to deal with her feelings through spiritual avenues. psychological test battery revealed severe depression, severe anxiety, and moderate hopelessness. was given a prescription for antidepressant medication and it was recommended that she receive individual psychotherapy sessions and psychiatric and psychological treatment for her symptoms of depression.

The medical certificate by , dated November 16, 2006, states that Ms. *present situation of having her husband refused entry into the United States as a result of* a criminal conviction, has reactivated the violent sexual abuse in youth. He states that she has inadequate psychic and spiritual resources at hand to cope with separation from either her children or husband.

The letter by dated July 29, 2006, states, in part, that she misses her daughters and one of her daughters had severe depression and stopped eating after moved to Austria. She conveys that there is no Church of Unity in Austria and that she regularly attended and volunteered at a Unity Church in the United States for eight years prior to moving to Austria. She conveys that she lives in the countryside and uses a wood burning stove to heat their apartment and they cannot afford to move elsewhere. Her husband, she states, has agreed to retire and live in the United States with her.

In her letter dated December 30, 2008, states that she has been working as a teacher in the United States so that she can spend time with her husband in Austria. She conveys that traveling to visit him has been difficult, especially because of her back pain. She states that "not a day goes by when I don't cry at some point."

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 that in view of ongoing trauma related to her childhood molestation as described in the psychiatric report and medical certificate, and the fact that her husband serves as her primary source of emotional support, the submitted evidence, when considered collectively, renders the emotional hardship in this case beyond that experienced by others in similar situations if were to remain in the United States without her husband.

To establish that would experience extreme hardship if she were to join her husband to live in Austria, the record contains statements made in letters and in the medical certificate and psychiatric report, a letter by her reverend dated February 22, 2007, in which her reverend states that she has known from 1997 to 2003 and that was active in the teen ministry as a teacher, mentor, and listener; and that she has been comforted and sustained by the Unity teachings. The record also contains a letter by the Unity-Academy for Applied Christianity, Registered Association dated December 27, 2008, which conveys that there is no Church of Unity in Austria and no Unity Services in Austria. Contained in the record is a letter by the mayor of the Municipality of Lichtenau Im Waldviertel stating that where the applicant's husband lives there are no job opportunities for a systems engineer and there are few jobs where English is spoken.

The AAO finds that the submitted evidence, when considered in the aggregate, establishes that Ms. would experience extreme hardship if she were to join her husband to live in Austria due to separation from her daughters, the lack of familiarity with the language and culture, and the absence of a Unity church, which the record conveys is important to her life.

The factors presented in this case constitute extreme hardship to a qualifying family member for purposes of relief under sections 212(h) and (i) of the Act.

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's spouse, his ties to the United States, including his spouse and U.S. citizen step-daughters, his volunteerism from August 2 to October 18, 2006 in a rural hospital in India, and the passage of approximately 12 years since his conviction in 1997. The unfavorable factors in this matter are the applicant's misrepresentation and criminal conviction. The AAO notes that the applicant does not appear to have committed any other crimes since his 1997 conviction.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the immigration laws of the United States and his criminal conviction, the AAO finds that the hardship imposed on the applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) and (i) of the Act the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.