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

U.S. Citizenship
and Immigration
Services

H/2

FILE: Office: MEXICO CITY (SANTO DOMINGO)

Date: SEP 28 2009

IN RE:

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).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, Mexico City, denied the waiver application that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica, the wife of a United States citizen, and the beneficiary of an approved Form I-130 petition. The applicant was found to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act) 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 in the United States with her husband.

The district director concluded that the applicant had not demonstrated that denial of the waiver application would result in extreme hardship to a qualifying relative as described in section 212(h) of the Act. **The application was denied accordingly. On appeal, counsel asserted that the applicant's husband would suffer extreme hardship if the applicant is not allowed to join him in the United States.**

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

(i) In general. – Except as provided in clause (ii), any 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].

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

(I) the crime was committed when the alien was under 18 years of age or

(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).

The applicant, then using the name [REDACTED] was arrested, on May 1, 1992, in Miami, Florida, pursuant to a warrant charging that she committed an assault on March 24, 1989 in Jamaica. The applicant was extradited to Jamaica to stand trial. On December 18, 1992, in Home Circuit Court 11, Kingston, Jamaica, the applicant was found guilty of a violation of Causing Grievous Bodily Harm contrary to Section 20 of the Offence against the Person Act.

The applicant was sentenced to 18 years confinement. On October 18, 2002 the applicant was paroled from that confinement, which parole expired on March 17, 2005. The applicant, who was born on November 20, 1945, was 43 years old at the time she committed the offense that resulted in her conviction.

Section 20 of the Offence against the Person Act, Causing Grievous Bodily Harm, states, in pertinent part,

Whosoever shall unlawfully and maliciously, by any means whatsoever . . . cause any grievous bodily harm to any person . . . with intent . . . to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person . . . shall be guilty of felony, and, being convicted thereof, shall be liable, to be imprisoned for life with or without hard labor.

On April 13, 2009 the AAO issued a request for evidence, according the applicant and counsel the opportunity to provide evidence to show that the subject statute might reasonably be applied to conduct not involving moral turpitude. Counsel responded that, because the applicant did not have the intent to cause grievous bodily harm, her conduct did not involve moral turpitude. Counsel further stated that the applicant might potentially have been more correctly convicted of a violation of a different section of the Offence against the Person Act.

Counsel appears to have misunderstood the thrust of the AAO's request.¹ The AAO cannot retry the applicant's criminal case to determine whether she was, in fact, guilty of the crime of which she was convicted, or to determine whether the applicant might alternatively have been charged with, and convicted of, some lesser crime.

In *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980), the Board of Immigration Appeals held that the Service cannot go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense. “[C]ollateral attacks upon an [applicant's] conviction do not operate to negate the finality of his conviction unless and until the conviction is overturned.” *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (Citations omitted.) A record of conviction constitutes a conviction for immigration purposes. The applicant can only appeal such a conviction within the court system.

The issue that was the subject of the AAO's request is whether there is a reasonable probability that acts not involving moral turpitude could correctly lead to a conviction under the statute pursuant to which the applicant was convicted. Counsel failed to adequately address that point.

Based on the language of the statute and other evidence in the record, the applicant's offense would generally be classified as an aggravated battery in the United States. An aggravated battery that requires the intent to cause great bodily harm, as the applicant's offense did, and in which great bodily harm actually results, as it did in the applicant's case, is a crime involving moral turpitude. *Guillen-Garcia v. INS*, 999 F.2d 199 (7th Cir. 1993).

¹ Counsel also mistakenly asserted that the applicant had been convicted pursuant to section 30 of the Offence Against the Person Act, rather than section 20.

The applicant was over 18 years of age when she committed the crime of Causing Grievous Bodily Harm. The maximum penalty for her crime was imprisonment for life, and she was sentenced to more than one year of imprisonment for the crime. She thus does not meet the requirements for an exception as set forth in section 212(a)(2)(A)(ii) of the Act.

The AAO finds that because she was convicted of a crime involving moral turpitude and does not qualify for the single petty offense exception, the applicant is inadmissible pursuant to Section 212(a)(2)(A). The balance of this decision will pertain to whether waiver of that inadmissibility is available and whether the applicant has demonstrated that waiver of that inadmissibility, if available, should be granted.

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

The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . 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

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 (BIA1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a nonexclusive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. 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 566. The BIA has held:

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. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

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).

A waiver of inadmissibility under section 212(h) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application.

The instant Form I-130, Petition for Alien Relative, and a previous Form I-130, both list the applicant as beneficiary. Both were filed by the applicant's son, [REDACTED], as petitioner. In an interview on May 9, 2006, the applicant claimed to have three children living in the United States. Because they were not listed on the waiver application as relatives through whom the applicant claims eligibility for a waiver, and the record contains no assertion or evidence that denying the waiver application would cause them hardship, hardship to the applicant's children will not be further addressed.

The applicant's husband is the only qualifying relative to be considered in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The record contains a letter, dated January 9, 2006, from the applicant's husband, who stated that he has been diagnosed with skin cancer, diabetes, and schizophrenia. He stated that he had recently had heart surgery during which a pacemaker was installed, and also that he is being treated for depression. He described the good care the applicant took of him, and noted that, in her absence, he has been confined to a nursing home. He described the care there, which, according to his account, appears to be substandard.

The record contains a letter, dated April 19, 2007, from the applicant. She stated that her husband lives in an old age home, is diabetic, and has an artery blockage and a pacemaker. She further stated that he is unable to shave or shower by himself, and that she has been told that he sometimes smell so bad that he repels other patients. She further stated that he is unable to travel and, in any event, would not have access to Veterans Administration (VA) health care if he were to move outside of the United States. The applicant's letter indicates that she was then in Trinidad.

The record contains Progress Notes showing that the applicant's husband was examined at a VA hospital medical center on various dates. Those notes show that the applicant's husband has been diagnosed with chronic paranoid schizophrenia, tobacco use disorder, valvular disorder, obesity, hyperlipidemia, non-insulin dependent type II diabetes, and "MALIG NEO SKIN NOS," which the AAO, based on the applicant's husband's representations, believes is a type of skin cancer.

One of the notes indicates that the applicant's husband was last discharged on March 28, 2000, which suggests that he was previously hospitalized. According to his doctor the applicant's husband was well-groomed at his August 8, 2001 appointment. A Progress Note dated November 7, 2001 indicated that the applicant's husband had been admitted to the hospital due to decompensation despite compliance with his regimen of medications.

A Progress Note dated May 29, 2002 indicates that the applicant's husband took part in group therapy. A Progress Note dated August 27, 2002 states that the applicant's husband was disheveled and unkempt. That note identified the applicant's husband's next of kin as his daughter, [REDACTED]. His diagnosis at that time was Seasonal Affective Disorder, Bipolar Type. A Progress Note dated August 29, 2002 indicates that the applicant's husband was seen at the hospital emergency room with chest pain. The applicant's husband's medical documentation indicates that he is on various medications.

The record contains a letter, dated April 20, 2007, from counsel. Counsel stated that the applicant's husband is in an "old age home in Miami, where the [VA] places patients that do not have a place to stay and no one to care for him." [sic] Counsel provided no corroborating documentary evidence that the applicant's husband's placement in a nursing home was due to the applicant's absence.

Initially, the AAO notes that the record contains no indication of any income the applicant earned in the United States and the applicant's husband has not alleged that he is suffering economically from the applicant's absence.

To be confined in a nursing home, rather than to be cared for in one's home by one's spouse, would generally constitute hardship, and the applicant's husband has illustrated that it constitutes hardship, in some degree, in this case. However, the record contains no corroborating evidence that he was placed in a nursing home merely because his wife was absent from the United States, rather than for some therapeutic reason. Further, the record contains no evidence, nor even an allegation, that the applicant's husband has no children or other relatives who are able to care for him. Under these circumstances, the AAO cannot find that the applicant's absence from the United States caused him to be confined in a nursing home, or that he is suffering extreme hardship that would be alleviated if the applicant were admitted to the United States.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's husband faces extreme hardship if the application is denied.

The AAO accepts that, in his fragile physical and emotional condition, the applicant's husband is likely precluded from traveling. Further, as the applicant noted, his VA medical benefits would be unavailable to him if he moved to Jamaica or Trinidad. The AAO accepts, therefore, that to relocate outside of the United States to be with the applicant would cause the applicant's husband extreme hardship, given his medical and psychological issues. The applicant remains ineligible for waiver of inadmissibility, however, based on the finding that her husband has not demonstrated that he would extreme hardship because of the denial of the waiver application if he remained in the United States.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.