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



U.S. Citizenship
and Immigration
Services

H2

[REDACTED]

JUN 01 2010

FILE: [REDACTED]

Office: LOS ANGELES, CALIFORNIA

Date:

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)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Honduras who was found to be 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 a crime involving moral turpitude. The applicant is the spouse of a lawful permanent resident and the mother of three United States citizen children. She now seeks a waiver of inadmissibility so that she may reside in the United States with her spouse and children.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated May 11, 2006.

On appeal, the applicant contends that United States Citizenship and Immigration Services (USCIS) erred in finding that the applicant had failed to meet the burden of establishing extreme hardship to her qualifying relative as necessary for a waiver. *Form I-290B; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from a social worker at Child Protective Services; statements from the applicant and her spouse; earnings statements for the applicant; a property profile; home loan statements; tax statements for the applicant and her spouse; W-2 Forms for the applicant and her spouse; bank statements for the applicant and her spouse; criminal court records; statements from family members and friends of the applicant; a statement from the senior pastor at the applicant's church; statements from the applicant's stepchild; statements from the applicant's oldest child; a student progress report for the applicant's oldest child, and a First Quarter Report for the applicant's middle child. The entire record was considered in rendering a decision on the appeal.

The applicant has the following criminal history. On January 30, 2002 the applicant pled guilty to three misdemeanor counts of Unlawful Intercourse by person over 21 with a minor less than 16 years of age under California Penal Code (CPC) § 261.5(d). *Criminal records, Superior Court of California, County of Riverside, Case Print*, dated July 21, 2005. The applicant was placed on probation for 36 months and ordered to pay fines. *Id.*

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

(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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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 -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(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 record establishes that the applicant has been convicted of three violations of CPC § 261.5(d), which the Ninth Circuit Court of Appeals has previously found is not categorically a crime involving moral turpitude. *Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007). In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General has articulated a new methodology for determining whether a conviction is for a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct that involves moral turpitude and conduct that does not. Pursuant to *Silva-Trevino*, when an offense is not categorically a CIMT, as is the case here, it is necessary to review the record of conviction, documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript, to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. If a review of the record of conviction is inconclusive, an adjudicator may consider any additional evidence deemed necessary or appropriate to resolve the moral turpitude question. *Silva-Trevino*, at 699-704, 708-709. In all such inquiries, the burden is on the applicant to establish that he or she is not inadmissible. *See* section 291 of the Act, 8 U.S.C. § 1361.

In the present case, the record contains only the court docket for the proceedings that resulted in the applicant's conviction. Therefore, on August 12, 2009, the AAO issued a request for evidence asking the applicant to supplement the record of conviction. *Request for Evidence*, dated August 12, 2009. On November 10, 2009 the applicant submitted a statement from her stepson, United States birth certificates for her three biological children, a statement from her oldest child, a student progress report for her oldest child, a First Quarter Report for the her middle child, criminal records

from the Superior Court of California, and a marriage certificate. The AAO observes that the criminal records submitted in response to the request for evidence are the same records that were submitted with the appeal. Therefore, the record before the AAO offers insufficient information to establish whether or not the crime committed by the applicant is or is not a CIMT. In that it is the applicant's burden in this matter to establish that she is not inadmissible to the United States based on her convictions under CPC § 261.5(d), the AAO finds the applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act and to require a 212(h) waiver of inadmissibility. The applicant does not contest this finding.

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. The plain language of the statute indicates that hardship that the applicant would experience if her waiver request is denied is not directly relevant to the determination as to whether she is eligible for a waiver under section 212(h). If 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, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States 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 the applicant's qualifying relatives must be established whether they reside in Honduras or the United States, as they are not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case. The applicant's qualifying relatives include a lawful permanent resident spouse and three United States citizen children.

If the applicant's spouse or children join the applicant in Honduras, the applicant needs to establish that her spouse or children will suffer extreme hardship. The applicant's spouse was born in Honduras. *Birth certificate*. His parents were born in Honduras. *Id.* The applicant's children were born in the United States. *Birth certificates*. They have no community ties to Honduras and their entire family lives in the United States. *Statement from the applicant*, dated June 26, 2006. The AAO also notes that conditions in Honduras have resulted in the extension of Temporary Protected Status (TPS) for Honduran nationals through July 5, 2010. As such, the AAO finds that the applicant has demonstrated extreme hardship to her spouse and children if they were to reside in Honduras.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. As previously noted, the applicant's spouse and his parents were born in Honduras. *Birth certificate*. The applicant's spouse asserts that he cannot possibly raise their children without the applicant's help and support, and that the family will not be able to survive without her. *Statement from the applicant's spouse*, dated September 22, 2005. While the AAO acknowledges this statement, it notes that the record fails to indicate whether there are additional family members who could assist the applicant's spouse with his child care responsibilities.

The applicant's spouse states that the applicant is an important part of their family and they are not complete without her. *Statement from the applicant's spouse*, dated September 22, 2005. The AAO acknowledges the difficulties faced by the applicant's spouse. However, 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. Separation from a loved one is a normal result of the removal process. The AAO recognizes that the applicant's spouse will endure hardship as a result of his separation from the applicant. However, the record does not distinguish his situation, if he remains in the United States, from that of other individuals separated as a result of removal or exclusion. Accordingly, it does not establish that the hardship experienced by the applicant's spouse would rise to the level of extreme hardship.

If the applicant's children reside in the United States, the applicant needs to establish that her children will suffer extreme hardship. The applicant's children were born in the United States. *Birth certificates*. The applicant's oldest child notes that his brother Andrew injured his leg and their mother is assisting in his healing process. *Statement from Christian Scelaya*, dated October 12, 2009. He also states that his youngest brother gets sick very quickly and that the applicant needs to be in the United States to take him to the clinic. *Id.* While the AAO acknowledges this statement, it notes the record fails to include any documentation from a licensed healthcare professional to support these claims. Going on record without supporting documentary evidence will not meet the burden of proof of 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)). Furthermore, there is nothing in the record to show the applicant's spouse would be unable to care for his children.

The applicant's oldest child states that he and his siblings need their mother, and it would be tragic to lose her. *Statement from [REDACTED]* dated October 12, 2009. *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. The AAO acknowledges the difficulties faced by the applicant's children and recognizes that they will endure hardship as a result of their separation from the applicant. However, the record does not distinguish their situation, if they remain in the United States, from that of other individuals separated as a result of removal or exclusion. Accordingly, it does not establish that the hardship experienced by the applicant's children would rise to the level of extreme hardship. When looking at the aforementioned factors, the AAO does not find that the

applicant has demonstrated extreme hardship to her children if they were to reside in 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 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 her burden.

ORDER: The appeal is dismissed.