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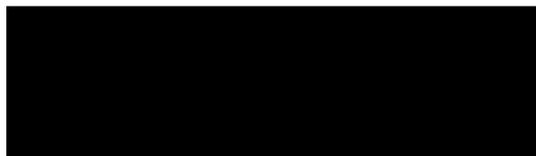
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U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
Office of Administrative Appeals  
20 Massachusetts Avenue, N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

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FILE:



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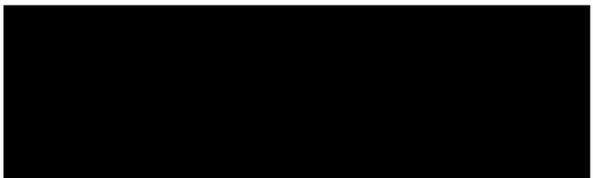
Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:



**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.

Thank you,

A handwritten signature in cursive script that reads "Michael Shumway".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible 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 committing crimes involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). 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.

On appeal, counsel contends that the applicant has demonstrated that her husband and U.S. citizen children will experience extreme hardship if the waiver is denied. Counsel states that the adjudications officer violated the applicant's children's constitutional due process rights by not considering them in the hardship analysis. Counsel avers that the applicant's children, who are nine and five years old, have only lived in the United States, and will experience culture shock in Mexico. Counsel asserts that the applicant and her husband will relocate to Santiago Papasquiario, Durango, Mexico, since that is where the applicant's wife is from and where her support network is located. Counsel states that the applicant's children are not fluent in Spanish so their educational opportunities and access to higher education in their mother's town will be limited. Counsel submits data from the National Institute of Geographical Statistics (INEGI) relating to Santiago Papasquiario which reveals that seventh grade is the average completed level of education; and a report on Mexico from the U.S. Department of State, which conveys that 7.9 years was the average educational attainment in 2003 for the age group of 15 years and older.

Counsel asserts that the applicant's children will leave their school, friends, family, and father if they joined their mother in Mexico. Counsel maintains that the applicant's husband has resided in the United States for almost 20 years, and has no family ties or support network in his hometown since all of his immediate family members are in the United States. Counsel avers that the applicant's husband currently has full access to medical and dental insurance through Blue Cross and Blue Shield, and that the applicant's husband and children will not have the same access to health care in Santigao Papasquiario that they now have. Counsel indicates that the applicant's husband has episodes of depression. Counsel declares that the applicant's husband earns \$30,000 annually and in Mexico will earn only \$9,568.

Further, counsel avers that the applicant's children will be traumatized if separated from their mother, and that they will not be able to receive the attention they will require from their father. In addition, counsel asserts that the applicant's husband will not only lose the \$26,000 in income from the applicant if she is no longer in the United States, but will have to support his wife living in Mexico. Moreover, counsel indicates that the applicant's husband financially supports his parents, who live with him, and that his wife takes care of his mother, who has Parkinson's Disease.

We will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing crimes involving moral turpitude.

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

(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.

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The applicant pled guilty to and was convicted of retail theft in Chicago on October 7, 1996, and retail theft (shoplifting) on October 6, 2003. She received six months court supervision for each crime.

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

Retail theft is under 720 ILCS 5/16A-3(A), which states:

A person commits the offense of retail theft when he or she knowingly:

(a) Takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise . . .

In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. In accordance with *Jurado*, we find the applicant's convictions for retail theft under 720 ILCS 5/16A-3(A) constitute crimes involving moral turpitude, rendering her inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section 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. The qualifying relatives in this case are the applicant's U.S. citizen spouse and U.S. citizen children. If extreme hardship to the 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).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios are possible should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action to be taken is difficult, and it is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. Cf. *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the

various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

*Id.* See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

In rendering this decision, the AAO will consider all of the evidence in the record.

Birth certificates in the record reflect that the applicant's children were born on April 19, 1999 and August 10, 2003. Employment information indicates that the applicant and his wife and children have health and dental insurance. Income tax records reflect the applicant's in-laws are dependents of the applicant and her husband. Information from INEGI relating to Santiago Papasquiaro reflects that the total population is 23,560; that not all members of the population have a claim to health services; and that the average degree of education is the seventh grade. The U.S. Department of State Country Reports on Human Rights Practices – 2007 for Mexico, states that “91 percent of children between the ages six and 14 attended school, but only 68 percent of all children entering the first grade completed all nine years of compulsory education. In 2003 average education attainment among the population 15 years of age and older was 7.9 years.” U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2007: Mexico*, 6 (March 11, 2008).

The applicant's husband conveys in his statement dated May 5, 2008, that he married his wife on September 9, 2000 and that they have two children. He indicates that he and his wife are both employed and purchased their house. The applicant's husband states that his mother has Parkinson's disease, high blood pressure, and obesity, and that his wife helps take care of his mother. The applicant's husband indicates that he financially supports his mother. Lastly, the applicant's husband maintains that he was diagnosed with depression and that he is stressed about being torn from his wife, who is the love of his life.

Family separation has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the type of familial relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) [REDACTED]

[REDACTED] It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and otherwise establish a life together, such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of familial relationship involved, the hardship resulting from family separation is based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O*, 21 I&N Dec. at 383. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The stated hardship factors in the instant case are the emotional and financial affect on the applicant’s husband and two children if they remain in the United States without the applicant. The applicant’s assertions that he and his wife have a close relationship, and that he depends on her financially is consistent with the evidence in the record, which are the income tax records, employment letters, and wage statements, the deed, and the mortgage statement. Counsel indicates that the applicant’s minor children will be traumatized without their mother. In accordance with the substantial weight that is given in the hardship analysis to the separation of spouses from one another and of minor children from a parent, and in view of the significant impact that the record establishes that separation from the applicant will have on the applicant’s husband and children, we find the applicant has demonstrated the hardship that her husband and children will experience as a result of separation is extreme.

With regard to joining the applicant to live in Mexico, counsel maintains that the applicant and her husband will relocate to Santigao Papasquiario since that is where the applicant’s wife is from and where her support network is located. The applicant’s husband avers that he has lived in the United States for 18 years and that all of his relatives reside here and that he has no ties to Jalisco, Mexico. The applicant’s husband conveys that it will be very difficult providing for his family in Mexico. He states that with his employer he earns \$13.00 per hour and has medical insurance. We note that the income tax records indicate that the applicant’s husband has been employed as a butcher for several years. Further, counsel asserts that the applicant’s children have only lived in the United States; that English is their primary language; and that educational opportunities in Santiago Papasquiario will be

limited since the applicant's children are not fluent in Spanish, and their access to higher education will be limited or non-existent. Counsel's assertions regarding education are consistent with the evidence in the record from INEGI and the U.S. Department of State report. Lastly, counsel avers that the applicant's husband and children will not have the same access to health care in the applicant's town. We note that the applicant and her husband presently perform menial jobs as a butcher and an assembler (the applicant). In view of their limited skills, which will likely restrict the applicant and her husband to performing similar jobs in Mexico, the applicant's husband's assertions about having difficulty providing for their family in Mexico are consistent with current conditions in Mexico as reported by the U.S. Department of State report, which conveys that the minimum wage does not provide a decent standard of living for a worker and family. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2007: Mexico*, 9 (March 11, 2008). When the hardship factors are considered collectively, the AAO finds they demonstrate extreme hardship to the applicant's spouse and children if they join the applicant to live in Mexico.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

*Id.* at 301.

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 adverse factors in the present case include the criminal convictions of retail theft in 1996 and 2003.

The favorable factors include the extreme hardship to the applicant's husband and children, and the applicant's character, as evidenced by the statement from her husband. In addition, it has been seven years since the applicant's most recent criminal conviction in 2003. The AAO finds that the crimes committed by the applicant are serious in nature; nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

**ORDER:** The appeal is sustained.