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



U.S. Citizenship
and Immigration
Services

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DATE: NOV 22 2011 Office: PHILADELPHIA

FILE:

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:

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 \$630. 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 Field Officer Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Serbia and is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of multiple crimes involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside in the United States with his U.S. citizen spouse and lawful permanent resident parent. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse.

In a decision dated April 21, 2009, the Field Office Director concluded that the required standard of proof of extreme hardship to the applicant's U.S. citizen spouse and lawful permanent resident father was not met and the application was denied accordingly.

On appeal, counsel for the applicant states that the Field Office Director did not consider the hardship to the applicant's spouse if she were to leave the United States with the applicant. Additionally, counsel states that the Field Office Director did not give sufficient weight to the financial and emotional hardships that the applicant's father would suffer should he remain in the United States without the applicant. Applicant's counsel submitted a supplemental statement of hardship from the applicant's father and medical documentation for the applicant's spouse on appeal; however, no legal brief was received by the AAO.

The record contains, among other documentation, an approved Petition for Alien Relative (Form I-130) filed on the applicant's behalf by his U.S. citizen wife, Application for Adjustment of Status to Lawful Permanent Resident (Form I-485), Application for Waiver of Grounds of Inadmissibility (Form I-601), Affidavit of Support (Form I-864), Biographical Information (Forms G-325A) for the applicant and his spouse, documentation regarding the applicant's criminal record in Pennsylvania, sworn statements from the applicant's father, a sworn statement from the applicant's spouse, medical records for the applicant's spouse, documentation regarding the applicant's father's business, documentation pertaining to the applicant's father's financial situation, the applicant's birth certificate, and documentation regarding the applicant's immigration history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

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

(A)(i) 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, or...

is inadmissible.

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

....

(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 record establishes that the applicant was convicted of Retail Theft, in violation of section [REDACTED] of the [REDACTED] on two separate occasions. The applicant was first convicted on [REDACTED]. For the first offense, he was convicted of a summary offense, and was ordered to pay a \$300 fine and court costs. The applicant was convicted of retail theft again on [REDACTED]. In relation to the second incident, he was convicted of a first degree misdemeanor, and was ordered to serve nine months of probation and pay court costs.

Pennsylvania Criminal Code § 3929, states, in pertinent part:

Retail theft

(a) Offense defined.--A person is guilty of a retail theft if he:

(1) takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof;

...

(b) Grading.--

(1) Retail theft constitutes a:

(i) Summary offense when the offense is a first offense and the value of the merchandise is less than \$150.

(ii) Misdemeanor of the second degree when the offense is a second offense and the value of the merchandise is less than \$150.

(iii) Misdemeanor of the first degree when the offense is a first or second offense and the value of the merchandise is \$150 or more.

...

Theft has long been held to be a CIMT. *Matter of Garcia*, 11 I. & N. Dec. 521 (BIA 1966). The Board of Immigration Appeals (BIA) has held that, in order to constitute a CIMT, a conviction for theft must involve a permanent taking. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). In

Matter of Jurado, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that a violation of Pennsylvania's retail theft statute reasonably allowed for the presumption that the conduct involved an intent to permanently deprive the owner of their property. The record of conviction in the applicant's case makes clear that that the applicant's convictions involved a violation of Pennsylvania Criminal Code § 3929(a)(1), which involves the intent to permanently deprive. Therefore the applicant's convictions for retail theft also constitute CIMTs. The applicant does not contest this finding.

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

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 --

...

(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; or

...

The applicant's qualifying relative in this case is his U.S. citizen spouse and his U.S. lawful permanent resident father. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (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*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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).

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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In this case, the qualifying relatives are the applicant’s U.S. citizen spouse and the applicant’s U.S. lawful permanent resident father. We must consider whether the qualifying relatives would suffer extreme hardship if they were to remain in the United States without the applicant and if they were to relocate abroad with the applicant. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994).

We will first consider the hardship claimed by the applicant’s U.S. lawful permanent resident father if he were to remain in the United States without his son. The applicant’s father states, in a sworn letter dated May 26, 2009, that he would suffer financial hardship if he were to remain in the United States and no longer be able to rely on his son’s support for his business. Specifically, he states that his son’s departure from the United States would be an extreme hardship because “we would have to spend money on commercial translation services in order to run the business in

the fashion which we currently run it.” The record also contains letters from the applicant’s father’s clients stating how impressed they are with the applicant’s work that he performs for his father’s business. Additionally, the applicant submitted some documentation of his father’s financial situation, including his tax returns, his stepmother’s unemployment documents, and business contracts for his janitorial service. Although the record makes clear that the applicant has played an integral role in his father’s business, there is no explanation given for why no other family member could engage in this work for the applicant’s father. If the applicant’s father’s spouse remains unemployed, no explanation is provided why she could not provide assistance to his business. Additionally, the applicant has a stepson. No information is provided to explain why his stepson does not or could not assist with translation. Additionally, the applicant’s father only states that he would have to “spend money” on commercial translation services if the applicant is no longer able to assist him. He does not say that he would lose his business or that he could not obtain other work. He does not provide any information regarding how expensive those services would be and why he cannot afford that expense. Moreover, the applicant’s father, in his sworn letter, does not state what emotional hardship he would suffer should he chose to remain in the United States without his son.

The applicant’s U.S. citizen spouse, in a sworn letter dated March 21, 2009, also claims financial hardship if she were to remain in the United States without the applicant. She states that the injuries that she suffered in a car accident on December 29, 2007, prevent her from working full time and that her “salary alone is not enough to maintain an acceptable standard of living.” In support of that statement, the applicant provides evidence of her medical condition as well as some evidence of the couple’s finances including the couple’s lease for their current and prior apartments. The couple was married on March 21, 2008. Notably, the lease for their current apartment reflects a rent of \$950 per month, but their previous lease was for \$650 per month. Although the applicant states that she would have to support herself should she no longer be able to rely on the applicant’s income, she has not provided evidence to show that doing so would be an extreme hardship. The applicant’s spouse has not stated why she could not move to another location with less expensive rent or whether she has any family members on whom she could rely for financial support or housing. Additionally, the applicant did not provide any evidence that his spouse’s medical condition continues to affect her ability to work full-time. The applicant’s spouse’s 2007 Federal Income Tax returns reflect that she earned \$18,818 in 2007 before she married the applicant. The applicant has not stated what her income was in 2008 or beyond. The most recent medical records submitted by the applicant were dated July 23, 2008 and her statement in support of her hardship claims was signed March 21, 2009. There is no indication, therefore, in the record that the U.S. citizen spouse’s health needs are ongoing and that her ability to work full-time remains limited, and, as a result, it is not possible to determine that she would suffer extreme financial hardship if she were separated from the applicant. The applicant’s spouse does not provide any evidence of other hardship that she would suffer if she were separated from the applicant.

The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship described by the applicant, his spouse, and his father, and as demonstrated by the

evidence in the record, is the common result of removal or inadmissibility and, even when considered in the aggregate, does not rise to the level of extreme hardship.

We must also consider whether the applicant's U.S. citizen spouse and/or father would suffer extreme hardship should they relocate to Serbia with the applicant. The applicant has not submitted any evidence regarding the economic or social conditions in Serbia.

The applicant's father states that he would suffer financial and emotional hardship should he move to Serbia with his son. He states that he would no longer have his business in the United States and as a result, would not be able to provide for his family. The applicant's father, however, is a native of Serbia, speaks the language there, and has not submitted any evidence to illustrate why he would not be able to obtain employment or start a business in that country. He simply states that he would not have the opportunities that he has in the United States. All evidence in the record of hardship to the applicant's father, should he relocate to Serbia, has been considered in aggregate. Based on the foregoing, the hardships claimed by the applicant in relation to his father appear to be the common type of hardship faced as a result of inadmissibility. The applicant has not shown that the hardship that his father would endure should he join him in Serbia would be extreme.

The applicant's attorney states that the applicant's spouse is a native of Croatia who came to the United States as a refugee and is unwilling to relocate to Serbia, or any of the former republics of Yugoslavia. Whether the applicant's spouse would suffer extreme hardship were she to choose to relocate to Serbia, however, cannot be evaluated based on the attorney's statements alone. Statements of counsel are not evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). No other evidence is provided in regards to hardship that the applicant's spouse would suffer if she were to choose to relocate to Serbia. The applicant's spouse's naturalization certificate indicates that she is a native of Croatia, however, no evidence is provided to illustrate that she came to the United States as a refugee. And no statement is made by the applicant's spouse that she presently fears returning to any of the former republics of Yugoslavia. Based on the evidence of record, it is not possible to find that the applicant's spouse would suffer extreme hardship if she were to relocate to Serbia.

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 U.S. citizen spouse or his lawful permanent resident father will face extreme hardship if the applicant is not granted a waiver of inadmissibility. Although the AAO acknowledges that the applicant's U.S. citizen spouse and father will suffer some hardship, the record does not establish that the hardship either one of them faces rises to the level of "extreme" as contemplated by statute and case law. Having found the applicant statutorily ineligible for relief under section 212(h) of the Act, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden and the appeal will be dismissed.



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ORDER: The appeal is dismissed.