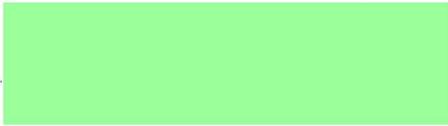




**U.S. Citizenship
and Immigration
Services**

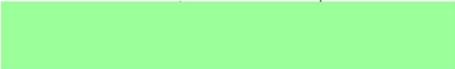
(b)(6)



Date: **FEB 19 2013**

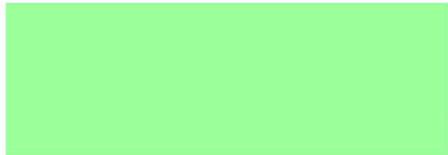
Office: PHILADELPHIA, PA

FILE: 

IN RE: Applicant: 

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.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

(b)(6)

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania, 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 crimes involving moral turpitude. The director stated that the applicant seeks 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 argues that the applicant demonstrated extreme hardship if the waiver was denied. Counsel contends that the applicant has three minor U.S. citizen children, who are 2, 11, and 12 years old; and lives with her partner, a lawful permanent resident and the biological father of her children. Counsel asserts that the applicant is the primary caregiver of their children and her partner would not be able to provide for them without her. Counsel conveys that the Individualized Education Program (IEP) forms reflect that the applicant's two oldest children have cognitive delays and learning disabilities. Counsel states that the applicant's son, [REDACTED] was treated for post-traumatic stress disorder caused by a head injury sustained as a child, and currently receives treatment for attention deficit hyperactivity disorder (ADHD), and behavioral problems. Counsel asserts that the physician's letter shows that the applicant's partner received disability payments due to a shoulder strain, a thoracic strain, and a knee contusion. Counsel asserts that the director failed to consider the family's emotional and health problems and wrongly attributed the academic problems of the children to speaking Spanish at home. Counsel argues that the family is in financial straits, as established from submitted overdue bills and foreclosure notices. Counsel contends that family unity is a crucial factor in the hardship assessment, and that all of the applicant's extended family members reside in the United States.

We will first address the finding of inadmissibility.

The applicant was found to be inadmissible for having been convicted of crimes involving moral turpitude.

Section 212(a)(2)(A)(i)(I) 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 . . . 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.)

On December 20, 1993, the applicant pleaded guilty to petty theft in violation of section 484(a) of the California Penal Code. The judge suspended imposition of the sentence for 24 months and placed the applicant on probation, and ordered she serve 5 days in jail. On July 30, 2001, the applicant pleaded guilty to retail theft and conspiring to commit retail theft in violation of 18 Pa. Consol. Stat. Ann. § 3929(a)(1). The judge ordered that the applicant pay a fine and costs.

Section 484(a) of the California Penal Code states in part:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

The applicant was convicted of retail theft and conspiring to commit retail theft in violation of 18 Pa. Consol. Stat. Ann. § 3929(a)(1), which provides in part:

(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 . . .

The director found the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. As the applicant has not disputed inadmissibility on appeal, and the record does not show the finding of inadmissibility to be erroneous, we will not disturb the finding of the director.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is 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. 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).

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).

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.*

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 1292, 1293 (9th Cir. 1998) (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 rendering this decision, the AAO will consider all of the evidence in the record.

The applicant contended in the affidavit dated March 10, 2010 that her sons [REDACTED] and [REDACTED] have special needs and attend special education classes. She stated that [REDACTED] has ADHD and was prescribed Ritalin, and is treated by a psychiatrist for behavioral problems. The applicant asserted that [REDACTED] is emotionally dependent on her and has panic attacks when anxious. She contended that if she returns to Mexico without her children they will suffer emotionally, especially [REDACTED]. She asserted that they barely manage financially and her family will not survive without her income. She declared that her partner will not be able to watch the children while he works at night, and will not be able to afford a care provider. She stated that they do not have family members nearby to help. Furthermore, the applicant asserted that if they relocated to Mexico, her sons will suffer because they will no longer have special education classes, and [REDACTED] mental health will deteriorate from the stress of a new environment and lack of mental health treatment. She declared that her children are not familiar with Mexico and she and her partner have not been to Mexico for years. The applicant conveyed that she was depressed in the past and is concerned about that she will become depressed in Mexico and not be able to take care of her children. The applicant contended that while they struggle financially in the United States, in Mexico they will have no work and will not be able to support themselves and their children. She stated that she and her partner are from a small rural village in southern Mexico where farming is the only available work, and they know nothing about farming.

The asserted hardships to the applicant’s children in remaining in the United States while the applicant lives in Mexico are financial and emotional in nature. The applicant’s declaration that her children will suffer emotionally if separated from her is consistent with the affidavit from the

applicant's partner dated March 17, 2010 in which he stated that the applicant has a close bond with their children, particularly their one-year-old son. The applicant's claim that [REDACTED] has ADHD, receives treatment for behavioral problems, and is emotionally dependent on her is in agreement with the psychiatric evaluation dated November 16, 2009 from Dr. [REDACTED] who stated that the applicant complained that nine-year-old [REDACTED] had behavioral problems at home and school, was not doing well academically, and had anxiety related to the trauma from a motor vehicle collision the family was in when [REDACTED] was three and one-half years old. Dr. [REDACTED] conveyed that the applicant stated that after the collision [REDACTED] had difficulty separating from her. Dr. [REDACTED] diagnosed [REDACTED] with ADHD, posttraumatic stress disorder, sibling relational disorder, a questionable learning disorder, problems with primary caregivers and in the educational setting, and trauma due to a motor vehicle accident. Lastly, the claim that the applicant's husband injured his knee and shoulder is in accord with disability insurance documentation and the letter from Dr. [REDACTED] dated April 22, 2011, which stated that the applicant's partner was placed on light duty at work with lifting and ambulation restrictions until he meets with an orthopedic surgeon. When we consider the asserted hardship factors together, we find they demonstrate that the emotional hardship to the applicant's minor son, [REDACTED], in remaining in the United States while his mother lives in Mexico, will be extreme, as it is more than the common or typical result of inadmissibility.

The declared hardships in relocating to Mexico with the applicant are not meeting the special education and mental health needs of the children, not being able to find work in which to support their family, and having to endure a new environment. The applicant declared that they have no family members in Mexico, are from a small rural village in southern Mexico where farming is the only available work, and will probably not be able to obtain jobs that will pay enough to support themselves and their children. Her assertion that they will have difficulty finding work is consistent with the psychiatric evaluation stating that the applicant and her partner have limited education (she has a sixth-grade education, and her partner, who works in a factory, has a fourth-grade education); disability records reflect the applicant's partner will be not be able to engage in strenuous physical labor; and newspaper articles convey that Mexico's economy has declined. The applicant's claim that her sons require special education is in accord with the IEP evaluations in the record, and her assertion that they will not have this need met in Mexico corresponds with the submitted information about special education in Mexico, which stated there are few special education services are offered in rural areas, and teachers generally do not have knowledge or training in how to deal with ADHD-type conditions in the classroom. Thus, when the asserted hardships are considered together, we find they demonstrate extreme hardship to [REDACTED] if he joined his mother to live in Mexico.

In *Matter of Mendez-Morales*, 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 are the criminal convictions for theft, as well as any unauthorized employment and unauthorized presence in the United States. The favorable factors in the present case are the affidavit by the applicant's partner praising the applicant's character and her close relationship with their children; the affidavit dated June 23, 2008 from [REDACTED] attesting to the applicant's positive lifestyle and behavior; the passage of 11 years since her convictions for CIMTs; and the letter dated June 20, 2008 from [REDACTED] the former assistant director/lead social worker/mental health counselor with the [REDACTED] who stated that the applicant was a client for a number of years after her arrest for theft in 2001 until her graduation from their program on June 20, 2007, and that the applicant volunteered for their program, is a changed person, and will not commit any crimes in the future. Mr. [REDACTED] stated that the applicant was discovered to have adult ADHA along with compulsive behavior, and learned how to alter her behavior to deal with stress. In sum, the crimes committed by the applicant are serious in nature. However, when we consider and weigh the favorable factors together, they 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.