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U.S. Citizenship  
and Immigration  
Services

H3

[REDACTED]

FILE: [REDACTED] Office: CIUDAD JUAREZ, MEXICO  
CDJ 2004 759 146

Date: FEB 10 2009

IN RE: Applicant:

[REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer-in-Charge (OIC), Ciudad Juarez, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [REDACTED], is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year.

The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The OIC concluded that the applicant had failed to establish that his 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. *Decision of the OIC*, dated July 24, 2006. The applicant submitted a timely appeal.

Although not addressed by the OIC, the record reflects that the applicant may be inadmissible under section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i), for her theft conviction, which may be a crime involving moral turpitude. The AAO will therefore make a determination regarding the applicant's criminal conviction.

With regard to the applicant's criminal conviction, the record reflects that the applicant pled guilty to and was convicted of retail theft in violation of 720 5/16A-3(a) of the Illinois Criminal Code of 1961, a class A misdemeanor, on June 1, 2004, in the Circuit Court of the 12<sup>th</sup> Judicial Circuit, Will County, Illinois.<sup>1</sup> The judge ordered that she be placed on 12 months court supervision, pay a fine, and have no contact with Kohl's during her supervision.

A "conviction" for immigration purposes is defined under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

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<sup>1</sup> 720 ILCS 5/16A-3 (from Ch. 38, par. 16A-3) provides, in part:

Sec. 16A-3. Offense of Retail Theft. 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 . . .

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record clearly establishes the applicant's conviction meets the definition of conviction within the meaning of section 101(a)(48)(A) of the Act.

Section 212(a)(2) of the Act states that:

(A)(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.

Petty theft is a crime involving moral turpitude. *See, e.g. Briseno-Flores v. Attorney General*, 492 F.3d 226, (3rd Cir. 2007)(alien stole two bottles of rum from grocery store). However, based on the record before it, the AAO finds the applicant to be eligible for the petty offense exception found in section 212(a)(2)(ii) of the Act.

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

(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 shows that the applicant's retail theft conviction in violation of 720 5/16A-3(a) of the Illinois Criminal Code of 1961 is a class A misdemeanor. Under Illinois law, the maximum penalty for the crime of which the applicant was convicted does not exceed imprisonment for one year. *See*, 730 ILCS 5/5-1-14. The record indicates that the applicant was not sentenced to any term of imprisonment. The evidence in the record thus establishes that the applicant's retail theft conviction falls within the petty offense exception to inadmissibility set forth in the Act.

The AAO will now address the finding of inadmissibility for unlawful presence under section 212(a)(9) of the Act, which provides, in pertinent part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.<sup>2</sup> For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.<sup>3</sup>

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. See DOS Cable, note 1. See also *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

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<sup>2</sup> Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

<sup>3</sup> See DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

The record reflects that the applicant entered the United States from Mexico without inspection in July 2002, remaining in the United States until September 2004, at which time she departed to Mexico. She therefore accrued two years of unlawful presence, and her departure triggered the ten-year-bar, rendering her inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The waiver for unlawful presence is under section 212(a)(9)(B) of the Act, which provides that:

- (v) Waiver. – The Attorney General [now Secretary, Homeland Security, “Secretary”] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 or parent of the applicant. Hardship to an applicant and to his or her child is not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s naturalized citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In support of the waiver application, the record contains an affidavit, untranslated documents, letters, a billing notice, and prescriptions.

In rendering this decision, the AAO has carefully considered all of the documentation in the record.

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors, which relate to the applicant’s qualifying relative, 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.* at 565-566.

The factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and the “[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). The trier of fact considers the entire range of hardship factors in their totality and then determines “whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant’s spouse must be established in the event that he remains in the United States without her, and alternatively, if he joins the applicant to live in Mexico. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

Although hardship to the applicant’s son is not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship experienced by the applicant’s spouse, as a result of his concern about his son, is a relevant hardship factor. Here, the record reveals that the applicant’s son was diagnosed with pallor of the left optic nerve with cupping in September 2004 by [REDACTED], who recommended an MRI to rule out a mass. *Undated letter by [REDACTED]*; *Letter by [REDACTED] dated September 9, 2004*. The affidavit by the applicant’s husband submitted on appeal states that his one-year-old boy, who is with his mother in Mexico, is under treatment for a problem in his left eye with [REDACTED], an ophthalmologist, in the United States.

In his affidavit, the applicant’s spouse further states that his son is unable to live in Mexico on account of respiratory infections and in support of his claim he submits prescriptions for medication and a letter by [REDACTED] in which he indicates that [REDACTED] states that they do not have the necessary equipment to care for his son in Mexico. The prescriptions show the applicant’s son was prescribed medication such as cefzil and andantol.

Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that the hardship to the applicant’s spouse, which is his concern about his son, who was diagnosed with pallor of the left optic nerve with cupping and is undergoing testing for the condition in the United States, rises to the level of “extreme” hardship if he joins the applicant in Mexico. Furthermore, the AAO finds that the totality of the record is sufficient to establish that the applicant’s spouse would suffer extreme hardship if he were to remain in the United States without his wife, given the same concerns regarding the medical problems of his young son.

The grant or denial of the above waiver does depend only on the issue of the meaning of “extreme hardship.” Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant’s spouse, and her U.S. citizen son. The unfavorable factors in this matter are the applicant’s entry into the United States without inspection, and her unlawful presence and criminal conviction.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant’s breach of the immigration laws of the United States, the AAO finds that the hardship imposed on the

applicant's spouse as a result of her inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained. The waiver application is approved.