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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship
and Immigration
Services

#3

FILE:

Office: MEXICO CITY (CIUDAD JUAREZ) Date: **MAY 19 2009**

(CDJ 2004 736 162 relates)

IN RE:

APPLICATION:

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

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City. The matter 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 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 for more than one year and seeking readmission within 10 years of her last departure. The district suggested that the applicant is also inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility in order to enter the United States and reside with her U.S. citizen husband and children.

The district director found that the applicant failed to establish extreme hardship to her U.S. citizen husband and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director*, dated November 14, 2006.

On appeal, counsel for the applicant asserts that the applicant's husband and children will suffer extreme hardship should the applicant be prohibited from entering the United States. *Brief from Counsel*, submitted January 16, 2007.

The record contains statements from counsel; statements from the applicant, applicant's husband, the applicant's husband's employer, and the applicant's children; copies of birth certificates for the applicant, the applicant's husband, and the applicant's children; a copy of the applicant's husband's naturalization certificate; a copy of the applicant's marriage certificate; a copy of the applicant's husband's passport; documentation relating to the applicant's husband's child support obligations; a psychological evaluation for the applicant's husband; medical documentation for the applicant's son; a document reflecting the applicant's psychological therapy in Mexico; a letter from the applicant's husband's church; documentation relating to the applicant's children's education; documentation regarding the applicant's criminal conviction; tax and financial documentation for the applicant and her husband; documentation of the applicant's husband's travel to visit the applicant in Mexico; documentation of telephone communication between the applicant and her husband; a summary of the applicant's husband's economic expenses; documentation of the transfer of funds to the applicant in Mexico, and; copies of photographs of the applicant's family. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

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

(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.

(v) Waiver. – The Attorney General [now the Secretary of 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.

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

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

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

- (h) The Attorney General [now Secretary, Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I) [or] (B) . . . 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

- (1) (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 [now the Secretary of Homeland Security (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 reflects that the applicant was convicted of retail theft in Illinois on February 2, 2005. All descriptions of acts that constitute retail theft under Illinois criminal law involve the permanent taking of the property, thus retail theft under Illinois law constitutes a crime involving moral turpitude. 720 Illinois Criminal Code § 5/16A-3. However, the applicant’s conviction meets the “petty offense exception” found in section 212(a)(2)(A)(ii)(II) of the Act.

The applicant’s crime was classified as a misdemeanor. Under Illinois criminal law, "misdemeanor" means any offense for which a sentence to a term of imprisonment in other than a penitentiary for less than one year may be imposed. 720 Illinois Criminal Code § 5/2-11. The applicant was given a sentence of three months probation and a fine of \$150. Accordingly, the applicant’s conviction meets the exception in section 212(a)(2)(A)(ii)(II) of the Act, and she is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The record reflects that the applicant entered the United States without inspection in or about November 2000. She remained until she voluntarily departed in September 2005. Accordingly, the applicant accrued over four years of unlawful presence in the United States. She now seeks admission as an immigrant pursuant to an approved Form I-130 relative petition filed by her husband on her behalf. She was deemed inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States. The applicant does not contest her inadmissibility on appeal.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant experiences upon being found inadmissible is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. Once 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 (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 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.

On appeal, counsel for the applicant asserts that the applicant's husband and children will suffer extreme hardship should the applicant be prohibited from entering the United States. *Brief from Counsel*, submitted January 16, 2007. Counsel explains that the applicant and the applicant's husband have one child together, and that the applicant's husband has four children from prior relationships. *Id.* at 1. Counsel provides that the applicant's husband shares custody of three of his children with his former wife. *Id.* at 2.

Counsel states that the applicant resides with her son in Mexico. *Id.* at 3. Counsel contends that the applicant's son has suffered health problems, yet he has been unable to seek proper medical attention because he does not have health insurance. *Id.* counsel explains that the applicant's son had surgery in Mexico City to correct a breathing problem he experienced when sleeping. *Id.* Counsel provides that the applicant's son recovered from the surgery for two weeks. *Id.* Counsel states that the applicant's son has difficulty walking due to having flat feet, and that he requires assistance or he falls every five to ten minutes. *Id.* Counsel contends that the applicant's son requires therapy to help him walk correctly. *Id.* Counsel asserts that the applicant's son would have healthcare in the United States, but that he cannot return without the applicant because the applicant's husband would be unable to work full-time and afford childcare services. *Id.* at 3-4.

Counsel asserts that the applicant's husband has been diagnosed with Major Depressive Disorder Severe, and that it is impacting his work performance, sleep, and appetite. *Id.* at 4. Counsel states that the applicant's husband's depression is so extreme that he experiences episodes of crying whether in public or alone. *Id.* Counsel contends that the applicant's husband will experience significant financial hardship if the applicant is prohibited from entering the United States. *Id.* Counsel states that the applicant's husband is enduring the burden of supporting his children in the United States, as well as supporting the applicant and their son in Mexico. *Id.* Counsel explains

that, after paying court-ordered child support, the applicant's husband's take home pay is \$2,314. *Id.* Counsel provides that the applicant's husband's monthly expenses, including supporting the applicant, total \$3,819.72. *Id.* Thus counsel contends that the applicant's husband has a shortfall of \$1,505.20 per month. *Id.* Counsel asserts that the applicant's husband has economic ties to the United States that prohibit him from relocating to Mexico, including his child support obligations and the home that he and the applicant own. *Id.* Counsel noted that the applicant's husband spends approximately \$450 per month on calling cards to communicate with the applicant. *Id.* Counsel provides that the applicant's husband has traveled to visit the applicant and their son in Mexico, but that the expense and limitations on leave from work reduce the amount of time he may do so. *Id.* at 4-5. Counsel contends that the applicant's husband's economic situation is further impacted due to missing work as a result of visiting the applicant in Mexico and as a result of his emotional suffering. *Id.* at 5.

Counsel stated that, when the applicant was in the United States she helped care for her husband's children when they visited on the weekends. *Id.* Counsel noted that the applicant's husband's children in the United States would experience hardship if the applicant's husband relocates to Mexico, as they would be separated from their father, half-brother, and step-mother. *Id.* Counsel contends that the applicant's husband will experience hardship should he relocate to Mexico. *Id.* at 5. Counsel explains that the applicant's husband would be separated from his four children from prior relationships in the United States. *Id.* Counsel states that the applicant's husband has resided in the United States for over 26 years and he has no family ties to Mexico. *Id.* at 6. Counsel contends that the applicant's husband has numerous relatives in the United States, including his parents, siblings, nieces, and nephews. *Id.* Counsel asserts that the applicant would be unable to earn sufficient income in Mexico to meet his family's needs should he relocate there. *Id.*

The applicant's husband described his relationship with the applicant, and he indicated that they married on August 29, 2001. *Statement from the Applicant's Husband*, dated January 5, 2007. The applicant's husband explained that the applicant and their son have resided in Mexico since September 2005. *Id.* at 2. He stated that he has four other children, and that he cares for the youngest two every other Friday to Sunday. *Id.* He provided that he talks to his oldest son on the phone every two to three weeks for ten to fifteen minutes. *Id.*

The applicant's husband stated that he has steady employment as a supervisor for a building maintenance company. *Id.* at 3. He asserted that he cannot relocate to Mexico because he needs to remain in the United States to work to support the applicant and his children. *Id.* He stated that he would be unable to find employment in Mexico that is sufficient to meet his economic needs. *Id.* The applicant's husband indicated that his and the applicant's son is unable to reside in the United States without the applicant, as the applicant must care for him so that the applicant's husband can work. *Id.* He stated that he would be unable to afford childcare services. *Id.*

The applicant's husband expressed that his children in the United States miss his son in Mexico, and that this fact causes him emotional distress. *Id.* The applicant's husband stated that he is permitted three weeks of vacation time, yet it is not enough to visit with the applicant and their son. *Id.* at 4. The applicant's husband expressed concern for his son's health in Mexico, and he noted that his son

had surgery for a breathing problem and he has required remedies to assist his walking due to having flat feet. *Id.* The applicant's husband explained that he is suffering from emotional hardship due to separation from the applicant and his son. *Id.* He stated that he has made mistakes at work. *Id.* He indicated that he went to a therapy session and was diagnosed with severe depression. *Id.* He stated that he believes more therapy would be helpful, but that he is unable to afford \$160 per session. *Id.* at 5. The applicant's husband indicated that he is having financial difficulty due to the applicant's absence, as the cost of communication and supporting the applicant and his son abroad exceed his income. *Id.*

The applicant provided a letter from her husband's employer that indicates that her husband has begun to experience problems at work, including forgetting instructions, crying, and becoming withdrawn. *Statement from* [REDACTED] dated January 8, 2006. The applicant submitted statements from her husband's children that reflect that they are close with the applicant's husband and they miss the applicant and the applicant's son. They further indicated that the applicant would help care for them when they would visit the applicant's husband.

The record contains a psychological evaluation of the applicant's husband conducted by a licensed clinical psychologist, [REDACTED]. Dr. [REDACTED] interviewed the applicant's husband and the applicant's husband's employer. *Report from* [REDACTED], dated November 28, 2006. Dr. [REDACTED] found that the applicant's husband exhibited symptoms of Major Depressive Disorder, Severe, Without Psychotic Features. *Id.* at 3.

The applicant provided a statement from a doctor in Mexico who diagnosed her son with rhinitis and hipertrofia adenoidea. *Statement from Andrea Watts*, dated January 10, 2007. The statement reflects that the applicant's son's adenoids were removed as a result, and he does not have symptoms. *Id.* at 1. The applicant provided documents relating to her husband's financial status and economic needs, including evidence of his child support obligations, his mortgage, tax records, communication and travel costs, and a summary of his regular expenses.

Upon review, the applicant has established that her husband will suffer extreme hardship if she is prohibited from entering the United States. The applicant has shown that her husband will experience extreme hardship should he relocate to Mexico to maintain unity with the applicant. The applicant's husband has significant family ties in the United States, included his parents, siblings, nieces, and nephews. The applicant's husband has four U.S. citizen children who reside in the United States. As the applicant's husband does not have sole custody of his minor children in the United States, it is reasonable that he would not be permitted to unilaterally decide to relocate them to Mexico. Thus, the record suggests that the applicant's husband would be separated from four of his children should he depart the United States. It is evident from statements in the record from the applicant's husband and the applicant's husband's children that he would endure significant emotional hardship should he be separated from them.

The applicant's husband has resided in the United States for a lengthy period. While he is a native of Mexico and he would not be faced with the challenge of adapting to an unfamiliar culture or

language, it is reasonable that he would endure emotional hardship due to abandoning his life and community in the United States after a lengthy residence of over 26 years.

The applicant's husband would endure economic hardship should he depart the United States. He would be compelled to relinquish employment he has held for over 15 years. The record reflects that the applicant's husband has child support obligations in the United States. It is reasonable that he would have challenges finding employment as a new arrival in Mexico that is sufficient to meet his needs while satisfying his child support obligations.

The AAO has considered all elements of hardship to the applicant's husband, should he depart the United States, in aggregate. The applicant has shown by a preponderance of the evidence that her husband would experience extreme hardship should he relocate to Mexico.

The applicant has shown that her husband would experience extreme hardship should she be prohibited from entering the United States and he remain. The record contains statements from the applicant's husband, the applicant's husband's employer, the applicant's husband's children, and a psychologist to show that he is experiencing significant emotional hardship due to being separated from the applicant and their son. Due to the applicant's husband economic needs and obligations, the record shows that he would have difficulty working full-time while either caring for his son or funding significant childcare services. Thus, the record suggests that the applicant's husband would remain separated from his young son should the application be denied. It is reasonable that continued separation from the applicant and their son is causing the applicant's husband significant emotional hardship.

The applicant has provided evidence to show that her husband is enduring economic hardship due to their separation, including the costs of communication and travel, as well as requirements to support the applicant and their son in Mexico. While the applicant has not shown that she is unable to work in Mexico to help meet her and her son's needs, the AAO acknowledges that the applicant's husband is experiencing emotional consequences due to the desire to support the applicant and his child.

The AAO has examined the report from [REDACTED] It is noted that the report was generated after a single interview with the applicant's husband and the applicant's husband's employer. Thus, it does not represent an ongoing relationship with a mental health professional or treatment for a mental health disorder. The AAO values the opinion of a mental health professional, yet the report, by itself, is not sufficient to show that the applicant's husband is suffering from emotional challenges that go beyond those ordinarily expected when family members are separated due to inadmissibility.

However, considering all of the documentation in aggregate, the AAO finds that the applicant has shown by a preponderance of the evidence that her husband will experience extreme hardship should he remain in the United States without her and their son.

Based on the foregoing, the AAO finds that denial of the present waiver application will result in extreme hardship to the applicant's husband. This finding is largely based on the fact that denial of

the application will likely result in the lengthy separation of the applicant's husband from one or more of his young children with no option for family unity in a single country.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the following:

The applicant entered the United States without inspection, in violation of the immigration laws of the United States. The applicant remained in the United States without a legal status for over four years. The applicant was convicted of retail theft, a crime involving moral turpitude.

The positive factors in this case include:

The applicant has not been convicted of any crimes since her single conviction; the applicant's crime was a misdemeanor; the applicant's husband would experience extreme hardship should the waiver application be denied; the applicant has helped care for her U.S. citizen stepchildren in the United States; the applicant has been involved in her community in the United States through religious activities; the applicant's U.S. citizen son would have greater access to medical care should he return to the United States with the applicant, and; the record reflects that the applicant has a stable marriage and family life.

While the applicant's transgression of U.S. immigration law and commission of a crime cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an 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. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden that she merits approval of her application.

ORDER: The appeal is sustained.