

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



H6

DATE: DEC 07 2011 OFFICE: CIUDAD JUAREZ, MEXICO FILE: [REDACTED]

IN RE: [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), and section 212(h), 8 U.S.C. § 1182(h); and Application for Permission to Reapply for Admission into the United States after Deportation or Removal filed under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

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

Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Ciudad Juarez, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of Argentina, who resides in Mexico, was found inadmissible under Immigration and Nationality Act (INA or the Act) § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure. The applicant was also found to be inadmissible under INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), based on his criminal convictions in the United States for theft in California and attempted theft in Nevada.¹ Lastly, the applicant was found to be inadmissible under section 212(a)(9)(A)(ii)(II) of the INA, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), due to the fact that he was ordered removed from the United States on March 20, 2003 after a conviction for an aggravated felony. The applicant seeks a waiver of inadmissibility pursuant to INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), and INA § 212(h), 8 U.S.C. § 1182(h), based on extreme hardship to his U.S. citizen wife and daughter. He also seeks Permission to Reapply for Admission into the United States after Deportation or Removal filed under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

On February 23, 2009, the Field Office Director concluded that the hardship that the applicant's U.S. citizen wife would suffer did not rise to the level of extreme as required by the statute.

On appeal, the applicant asserts that his U.S. citizen spouse and daughter are suffering from extreme emotional hardship. In this regard, the applicant submitted a report from a psychologist regarding his spouse and daughter's mental health.

In support of the waiver application, the record includes, but is not limited to, affidavits and letters written by the applicant's U.S. citizen spouse, a psychological report from [REDACTED] concerning the applicant's U.S. citizen spouse and daughter, a legal brief from the applicant's former counsel, documentation pertaining to the applicant's conviction in Nevada, birth certificate for his U.S. citizen daughter, the applicant's marriage certificate, the applicant's spouse's naturalization certificate, copies of the U.S. passport biographical pages and evidence of lawful permanent resident status of the applicant's spouse's family, documentation of the applicant's spouse's income history in the United States, certificates received by the applicant's spouse, telephone records, plane ticket receipts for the applicant's spouse and daughter, a letter from the applicant's daughter's doctor, letter from the applicant and translation of letter, letters of support from family and friends of the applicant's spouse, documentation of the applicant's residence in Mexico, and records concerning the applicant's immigration history in the United States.

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

¹ The Field Office Director does not make clear in his decision whether he considered both of the applicant's convictions.

appeal. The AAO will first address the question of whether the applicant is admissible to the United States.

The applicant was found to be inadmissible under INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Section 212(a)(9) 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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

...

(v) The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

The applicant reports that he entered the United States as a non-immigrant visitor on an unknown date in 1995; however, no evidence of his admission is provided. He reports that he remained in the United States unlawfully after his authorized period of stay. The applicant accrued more than one year of unlawful presence in the United States for the purposes of INA § 212(a)(9)(B)(i)(II) between April 1, 1997, the effective date of the unlawful presence provisions under the Act, until March 20, 2003, the date of his removal. As his last departure on March 20, 2003 was within the last ten years, he remains inadmissible under INA § 212(a)(9)(B)(i)(II). A waiver is available for this ground of inadmissibility under INA § 212(a)(9)(B)(v). This waiver allows for the consideration of extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent of the applicant.

The applicant's qualifying relative under INA § 212(a)(9)(B)(v) is his U.S. citizen spouse. 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-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship in cases under INA § 212(a)(9)(B)(v) for waivers of unlawful presence. Hardship to the applicant or to the applicant's child will not be separately considered, except as it may affect the applicant's spouse.

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 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.

We must consider whether the qualifying relative 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 spouse if she were to remain in the United States without the applicant.

The applicant's spouse in her declaration dated September 25, 2007, describes the history of her relationship with the applicant and the experiences that they have had together. In relation to the hardship that she would suffer due to their separation she explains that she has already been separated from the applicant since the time of his removal, more than four years prior to this application. She states that she needs her husband and that "he gives me the strength to move forward, he supports me in everything I need without questioning and he only tries to understand me." She also states that the applicant helps her "morally" and "economically." She reports that she gets depressed when she is visiting him in Mexico because she wants his immigration situation to be resolved. She says that when she is in the United States that "being with her family is great because they do what they can to help [her], to understand [her], for [her] not to be alone" but she says that she needs her husband to make her "feel secure, trusted, the courage to keep going, the one that does not let[sic] [her] fall down."

On appeal, the applicant submitted a Psychological Assessment prepared by [REDACTED], a clinical psychologist. [REDACTED] report was prepared based on one meeting with the applicant's spouse and daughter on March 25, 2009 in response to the denial of the applicant's waiver application on February 23, 2009. [REDACTED] conducted various personality and social-emotional tests. [REDACTED] reports that the applicant's spouse's psychological condition was extremely serious and required psychotropic medication intervention and psychotherapy immediately. The information reported by [REDACTED], however, contradicts the other evidence in the record. [REDACTED] reports that the applicant's spouse is socially isolated and that her only source of emotional support is the applicant. Without further explanation of why the applicant's spouse is now isolated and no longer can rely on her extensive family in the United States for

support, we cannot reach the conclusion that the report is an accurate assessment of the applicant's spouse's emotional health. In fact, [REDACTED] states that the applicant's spouse lives with her parents and two sisters, in addition to her daughter, but does not provide any explanation for why the applicant's spouse cannot rely on her family for emotional support. [REDACTED] also states, that in regard to the Minnesota Multiphasic Personality Inventory, that appears to be the basis for her diagnosis of Major Depressive Disorder, the applicant's spouse's profile "indicates an extreme sense of being overwhelmed, and indicates that this patient may have over-endorsed some items." Additionally, the assessment cites physical complaints made by the applicant's spouse, such as trouble sleeping, loss of appetite, headaches, stomachaches, and excessive worry about her physical health, but the applicant does not provide any evidence that his spouse has seen a medical doctor for those concerns, or a report from a medical doctor addressing them. The applicant's spouse has not provided any independent evidence that she has lost weight or that her physical or psychological complaints have affected her ability to work or care for herself and/or her daughter.

Moreover, [REDACTED] does not explain in her report why the applicant's spouse is unable to relocate to Mexico to alleviate the symptoms that she describes. [REDACTED] concludes that "it is extremely important for this patient to be reunited with her husband, and to continue living in the United States in order to receive psychiatric and psychological intervention," but she does not explain why the applicant's spouse cannot relocate to Mexico to be reunited with her husband or why appropriate psychiatric care is not available in Mexico. The AAO respects and gives due consideration to the reasoned opinions of mental health professionals; however, because [REDACTED] report contradicts other evidence in the record, and no explanation is given for these contradictions, it is not possible to draw a conclusion that the applicant's spouse is suffering from extreme emotional hardship based on the information provided.

Both parents of the applicant's spouse also state that the applicant's spouse is suffering emotional hardship, but cite only generalized concerns without providing any specific examples. The record contains numerous letters from other family members and friends that speak to the applicant's moral character, remorse, and generally of the difficulty that the applicant's spouse and child experience in his absence. The applicant's moral character and remorse, however, are not relevant to the determination of hardship to the applicant's spouse. Although those letters may be relevant to a discretionary determination, we do not reach that determination until extreme hardship has been established. Any hardship described to the applicant's spouse, such as general statements that the applicant's spouse needs her husband, is the type of hardship that is expected when spouses are separated due to immigration violations.

In regards to any financial hardship that the applicant's spouse has suffered, the applicant has provided evidence of the expenses incurred for his spouse and daughter's travel to Mexico and for telephone bills between Mexico and the United States, but no additional information or evidence is provided of the applicant's spouse's expenses. The record makes clear that she lives with members of her family, but no information is provided as to her rent or living expenses and whether those are not able to be met by her income. No evidence is provided of any financial support that the applicant has provided to his spouse before or after his removal from the United

States. In regards to the "economic" hardship that the applicant's spouse references in her letter, not enough information is provided to determine the degree of financial hardship that the applicant's spouse is suffering.

As to whether the applicant's spouse would suffer extreme hardship if she were to move to Mexico to reside with the applicant, the applicant's spouse states that she has not chosen to reside permanently in Mexico because her "life is rooted" in the United States, her family resides in the United States, and she worked very hard to become a citizen of the United States. The applicant's spouse became a U.S. citizen in 2004. The applicant's spouse is a native of Mexico, graduated from high school there, and speaks Spanish as her native language. There is no evidence that the applicant's spouse has any significant health conditions that would be exacerbated by relocation to Mexico or that she would be unable to obtain employment there. The emotional hardship reported by [REDACTED] in her psychological assessment is related to separation from the applicant; as such it is not clear that the applicant's spouse would continue to experience emotional hardship if she were to relocate to Mexico. The applicant's spouse has stated that she fears living in Mexico because of the news reports of how dangerous it is there. She also states that she does not want her daughter to live there. She mentions that her daughter had a disease that was cured in the United States, but she does not provide any specific information about the illness nor does she provide any medical records. The applicant did not provide any documentation concerning the country conditions in Mexico. Even were the AAO to take notice of general conditions in Mexico, the record lacks evidence demonstrating how the applicant's spouse would specifically be affected by any adverse conditions there. In fact, the applicant has provided evidence that his spouse and young daughter travel to Mexico to visit him every couple of months, but no information is provided regarding whether they have been adversely affected by the conditions in the country while there. Accordingly, the record does not show that relocation to Mexico would cause extreme hardship to the applicant's spouse. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66.

In sum, although the record indicates that the applicant's spouse has experienced emotional hardships based on separation from her husband, there is not enough documentary evidence to illustrate that those hardships, considered in the aggregate, rise to the level of extreme beyond the common results of removal. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991); *Perez*, 96 F.3d at 392 (defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation); *Matter of Pilch*, 21 I&N Dec. at 631.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that the applicant has failed to meet his burden to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act.

The Field Office Director also found the applicant to be inadmissible under INA § 212(a)(2), which 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 illustrates that the applicant was convicted of petty theft in the Municipal Court of Newport Beach, California in relation to an arrest for burglary on July 19, 1990. The record of conviction for this offense is not in the record, thus no conclusion can be made regarding the applicant's inadmissibility or eligibility for a waiver in regards to this offense. In proceedings for an application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In any future proceedings, the applicant is responsible for providing the complete records for this conviction.

Records are included for the applicant's second conviction. The record establishes that the applicant was convicted of Attempted Theft on December 5, 2002, in the District Court for Clark County, Nevada Revised Statutes (N.R.S.) §§ 193.330 (attempt), 205.0832 (theft), 205.0835 (penalties), a category D felony/gross misdemeanor. N.R.S. § 205.0832 states, in pertinent part:

Actions which constitute theft

1. Except as otherwise provided in subsection 2, a person commits theft if, without lawful authority, the person knowingly:

...
(b) Converts, makes an unauthorized transfer of an interest in, or without authorization controls any property of another person, or uses the services or property of another person entrusted to him or her or placed in his or her possession for a limited, authorized period of determined or prescribed duration or for a limited use.

...

The record indicates that the applicant was sentenced to 32 months imprisonment, suspended, and indeterminate sentence of probation for three years. 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). However, the applicant has not contested this finding by asserting that his conviction is not a crime involving moral turpitude.

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 is eligible to apply for a waiver of inadmissibility under INA § 212(h) for inadmissibility under INA § 212(a)(2), as he has two qualifying relatives, his U.S. citizen spouse and his U.S. citizen daughter. The activities for which he was last convicted occurred on April 27, 2002, within the past 15 years. As such he must prove extreme hardship to a qualifying relative in order to be eligible for a waiver of inadmissibility under this section of the law. Nevertheless, as the applicant has not established extreme hardship under section 212(a)(9)(B)(v) of the Act, no purpose would be served at this time in separately determining whether the applicant qualifies for a waiver under INA § 212(h) or merits a waiver as a matter of discretion.

Lastly, the applicant is inadmissible under INA § 212(a)(9)(A)(ii)(II) due to the fact that he was removed after a conviction determined to be an aggravated felony. In regards to this ground of inadmissibility, the applicant has submitted an Application for Permission to Reapply for Admission into the United States after Deportation or Removal, Form I-212. The AAO notes that the Field Office Director denied the applicant's Form I-212 in the same decision as the denial of his Application for a Waiver of Grounds of Inadmissibility. Where an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, no purpose would be served in granting the application. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964). As the applicant is inadmissible under section § 212(a)(9)(B)(i)(II) of the Act, and has failed to meet his burden of proof that his inadmissibility results in extreme hardship to his U.S. citizen spouse, no purpose would be served in granting the applicant's Form I-212.

ORDER: The appeal is dismissed.