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U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: MIAMI Date: DEC 10 2008

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[redacted]

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 Acting District Director, Miami, Florida. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to 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 a crime involving moral turpitude. The applicant is married to a naturalized U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his wife and stepdaughter in the United States.

The acting district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the Acting District Director*, dated January 30, 2006.

On appeal, counsel contends that the applicant's wife, stepdaughter, and biological daughter from another relationship would suffer extreme hardship if he were refused admission to the United States. *Brief in Support of Appeal*, dated June 2, 2006.

The record contains, *inter alia*: a copy of the marriage license of the applicant and his wife, Ms. indicating they were married on September 30, 2005; a copy of [redacted]s naturalization certificate; a copy of the applicant's daughter's birth certificate; a copy of [redacted]s daughter's birth certificate; a letter from the applicant's daughter's mother, stating she receives monthly child support payments from the applicant and copies of the checks; a letter of support from [redacted] a copy of [redacted] daughter's Individual Educational Plan ("IEP"); a copy of the Articles of Incorporation of the applicant's auto mechanics business; financial and tax documents; conviction documents; a letter from the applicant's former employer; a letter from the applicant's church; and photos of the applicant with his family. The entire record was reviewed and considered in rendering this decision on the appeal.

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

> (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.

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

> The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> > (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 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 applicant's wife, daughter, and step-daughter, who was ten years old when the applicant and [redacted] married, are qualifying family members for section 212(h) purposes. *See* section 101(b) of the Act, 8 U.S.C. §1101(b) (defining a "child" as "an unmarried person under twenty-one years of age who is . . . a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred").

The record shows that the applicant pled guilty to cashing, or attempting to cash, a total of eight counterfeit checks ranging in amounts from approximately $1500 to $2000 from January 21-29, 1999. He was charged with multiple counts of uttering a forged instrument and grand theft in the third degree in violation of Florida Statute §§ 831.02 and 812.014(2)(C)(1), respectively. He received five years probation. Therefore, the record shows that the applicant is inadmissible under section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), for having committed a crime involving moral turpitude. *See Briseno-Flores v. Att'y Gen. of U.S.*, 492 F.3d 226, 228 (3d Cir. 2007) (guilty plea to petty theft was a crime involving moral turpitude) (citing *Quilodran-Brau v. Holland,* 232 F.2d 183, 184 (3d Cir. 1956) ("It is well settled as a matter of law that the crime of larceny is one involving moral turpitude regardless of the value of that which is stolen"), and *Matter of Scarpulla,* 15 I&N Dec. 139, 140-41 (BIA 1974) ("It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude").

A section 212(h) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. 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-Moralez,* 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include: the presence of family ties to U.S. citizens or lawful permanent residents in the United States; family ties outside the United

States; country conditions where the qualifying relative would relocate and family ties in that country; the financial impact of departure; and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). In addition, the Court of Appeals for the Ninth Circuit has held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted).

The record reflects that the applicant and his wife met in July of 1998 when [redacted] daughter was three years old. *Letter from* [redacted], dated January 10, 2006. [redacted] daughter, [redacted], a U.S. citizen, suffers from learning disabilities, has repeated the second and third grades, and receives several accommodations in school including special instruction, one-on-one instruction, extra time, small group lessons, shortened sessions, and additional breaks. *Id.; Individualized Educational Plan*, dated December 8, 2004. According to [redacted], the applicant has been the only father [redacted] has ever known. *Letter from* [redacted] *supra.* He helps [redacted] with her homework and special projects, and has been a "key support to [redacted] emotional stability and a great support for her academic development." *Id.* [redacted] further states that she is financially dependent on her husband and could not meet their living expenses if he were deported. *Id.* She claims that they opened a new business in December 2004, and that she would have to declare bankruptcy if the applicant were deported. *Id.*

In addition, the record shows that the applicant pays at least $250 per month in child support payments to support his U.S. citizen daughter, [redacted] The record contains nine copies of canceled checks for $250 from July 2005 through December 2005. [redacted]'s mother is a single mother to three children and states that she needs child support from the applicant in order to meet the basic needs of her family. *Letter from* [redacted] dated January 2, 2006.

Upon a complete review of the record evidence, the AAO finds that the applicant has established that his wife, daughter, and step-daughter will experience extreme hardship if he is prohibited from remaining in the United States.

In this case, considering all of the factors in the aggregate, the applicant has met his burden of establishing extreme hardship. Although the record could have been more extensive to include, for example, a letter from a health care professional or teacher suggesting the importance of the applicant's presence in [redacted] life and financial documents from [redacted] mother, it is evident from the record that [redacted] has a learning disability and that the applicant has played a stable, caring, and active role in her development and education. It is also evident from the record that the applicant has regularly paid child support to [redacted] mother. Furthermore, the record shows that the applicant and his wife recently started their own business - an auto-mechanics business, an area in which the applicant has considerable expertise. *See 2004 Profit or Loss From Business (Schedule C)* (stating the applicant's principal business as a mechanic). Moreover, going to Cuba with the applicant to avoid separation would be an extreme hardship for [redacted] particularly considering her learning disability and the annual evaluations she receives to assess the accommodations she needs to perform in school, as well as for [redacted] as she would need to give up the couple's new business. Considering the combination of these factors in their totality, the denial of a waiver of inadmissibility would cause extreme hardship to the applicant's qualifying relatives.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is the applicant's criminal record of uttering a forged instrument and grand theft. The favorable and mitigating factors in the present case include: the applicant's significant family ties to the United States, including his wife, step-daughter, daughter, aunts, uncles, and cousins; the extreme hardship to the applicant's wife, step-daughter, and daughter if he were refused admission, particularly in light of his step-daughter's learning disability; the applicant's record of working and paying taxes in the United States; the applicant's lack of immigration violations in the United States; the letter of support from the applicant's church; and the fact that the applicant has not had any further arrests or convictions in almost ten years.

The AAO finds that, although the applicant's criminal history is serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.