



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

H/2

[REDACTED]

FILE:

[REDACTED]

Office: LOS ANGELES

Date: MAY 23 2006

IN RE:

[REDACTED]

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:

[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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua 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 crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his permanent resident wife and U.S. citizen children.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated July 21, 2003.

On appeal, counsel for the applicant contends that the district director failed to conduct adequate analysis or follow precedent law in denying the application. *Attachment to Form I-290B*, dated August 19, 2003.

The record contains a statement from counsel as an attachment to Form I-290B; a brief from counsel; a copy of the applicant's marriage certificate; copies of birth certificates for the applicant's children; letters verifying the applicant's employment; tax records for the applicant and his wife; evidence of the applicant's daughter's school attendance; copies of photographs of the applicant and his family members; a statement from the applicant's wife in support of the Form I-601 application; a copy of the permanent resident card for the applicant's wife; evidence that the applicant and his wife have automobile insurance, and; documentation of the applicant's criminal history. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2) of the Act states in pertinent part, 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.
 - (ii) Exceptions. – 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 . . . 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).
 - ...

- (B) Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

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 has been convicted of two crimes. Specifically, in December 1993 he pled guilty to theft of property pursuant to section 484(A) of the California Penal Code, for which he received a sentence of one day of incarceration and three years of probation. On November 5, 1996, he pled guilty to possessing a bad check or money order pursuant to section 475A of the California Penal Code, for which he was ordered to pay \$200 restitution and he received a sentence of 90 days incarceration and three years probation. Based on these convictions, the district director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for committing a crime involving moral turpitude.

On appeal, counsel contends that the applicant is not inadmissible. Counsel asserts that the record does not support that the offense of theft of property under section 484(A) of the California Penal Code is a crime involving moral turpitude. *Brief from Counsel* at 5-7, dated November 25, 2003. Counsel contends that section 484(A) of the California Penal Code describes numerous acts which constitute petty theft, some of which do not require a *mens rea* element. *Id.* at 6-7. As example, counsel provides that section 484(A) of the California Penal Code criminalizes "driving away the personal property of another," which does not require criminal intent which

may form the basis of a crime involving moral turpitude. *Id.* at 7; Section 484(A) of the California Penal Code. Counsel suggests that, as the record does not specify what portion of the section 484(A) under which the applicant was convicted, the applicant's actions that led to the conviction may not have involved a criminal intent that potentially renders his actions a crime involving moral turpitude. *Id.*

Counsel further asserts that the applicant qualifies for the petty offense exception provided at section 212(a)(2)(A)(ii) of the Act. *Id.* at 7-9. Counsel suggests that, as arguably only one of the applicant's crimes constitutes a crime involving moral turpitude, he has only committed one crime as contemplated by section 212(a)(2)(A)(ii) of the Act.

Upon review, the applicant has not shown that he was erroneously deemed inadmissible. The applicant's conviction for "petty theft" under section 484(A) of the California Penal Code constitutes a crime involving moral turpitude. Counsel mischaracterizes section 484(A) of the California Penal Code by omitting an operative word from his example of a criminalized act. Counsel correctly notes that section 484(A) of the California Penal Code criminalizes numerous individual acts of theft. However, each act described in the statute contains a *mens rea* element of intent to commit a crime. Counsel notes that section 484(A) of the California Penal Code criminalizes "driving away personal property of another," yet section 484(A) of the California Penal Code in fact criminalizes "*feloniously . . . driv[ing] away the personal property of another.*" *Brief from Counsel* at 6; Section 484(A) of the California Penal Code(emphasis added). The word "felonious" is defined as follows:

A technical word of law which means done with intent to commit a crime, *i.e.* criminal intent. Of the grade or quality of a felony, as, for example, a felonious assault (*q.v.*). Malicious; villainous; traitorous; malignant. Proceeding from an evil heart or purpose. Wickedly and against the admonition of the law; unlawfully.

Blacks Law Dictionary at 428 (6th Ed. 1983).

Thus, acts of theft proscribed by section 484(A) of the California Penal Code include a criminal intent.

Further, there is ample precedent to support that petty theft under section 484(A) of the California Penal Code constitutes a crime involving moral turpitude. *See, e.g., United States v. Esparza-Ponce*, 193 F.3d 1133, 1135-37 (9th Cir. 1999); *Morales-Alvarado*, 655 F.2d 172, 174 (9th Cir. 1981); *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir. 1989), *overruled on other grounds*, *Proa-Tovar*, 975 F.2d 592, 595 (en banc)(9th Cir. 1992); *United States v. Lopez-Vasquez*, 1 F.3d 751, 755 n.8 (9th Cir. 1993); *In re De La Nues*, 18 I&N Dec. 140, 145 (BIA 1981); *In re Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974). In *United States v. Esparza-Ponce*, the Ninth Circuit stated that, "In addition to . . . statements in our own cases, every other circuit that has addressed the question in the context of the immigration laws has concluded that petty theft is a crime involving moral turpitude for purposes of those laws." *United States v. Esparza-Ponce*, 193 F.3d at 1135-37(citations omitted). Accordingly, as the applicant has been convicted of theft under section 484(A) of the California Penal Code, he has been convicted of a crime involving moral turpitude.

The applicant has not established that he qualifies for the petty offense exception. Section 212(a)(2)(A)(ii) of the Act clearly provides that an applicant may qualify for the exception in the event that he committed only one crime. Counsel suggests that section 212(a)(2)(A)(ii) of the Act applies if an applicant has committed

only one crime involving moral turpitude. However, section 212(a)(2)(A)(ii) of the Act explicitly provides that the “petty offense” exception may apply “to an alien who committed only one crime.” Section 212(a)(2)(A)(ii) of the Act. Section 212(a)(2)(A)(ii) of the Act does not consider whether an applicant’s multiple crimes involved moral turpitude, but whether an applicant committed multiple crimes of any kind. *Id.* The record clearly reflects that the applicant has been convicted of two crimes. Thus, the applicant is not eligible for an exception under section 212(a)(2)(A)(ii) of the Act.

Based on the foregoing, the applicant has not shown that he was erroneously deemed inadmissible under section 212(a)(2)(A)(i)(I) of the Act for committing a crime involving moral turpitude.

The AAO notes that section 212(h)(1)(B) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. Hardship the applicant himself experiences due to his inadmissibility is irrelevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant’s permanent resident wife and U.S. citizen children. *Id.* If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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.

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 Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and that, “[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.” (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. The AAO further notes that the applicant’s wife and son would possibly remain in the United States if the applicant departs. Separation of family will therefore be carefully considered in the assessment of hardship factors in the present case.

The record contains little evidence regarding the prospective hardship to the applicant’s wife or children should he be prohibited from remaining in the United States. The applicant’s wife provided a brief statement in support of the Form I-601 application. She stated that the applicant serves as the primary income earner for

their family, and they have been able to meet their economic needs without government assistance. *Statement from Applicant's Wife in Support of Form I-601*, dated April 5, 2003. The applicant's wife provided that her whole family will experience extreme emotional and economic hardship if the applicant's waiver application is denied. *Id.* She indicated that her family's situation "goes over any normal disruption that a removal of a family member can usually [sic] cause." *Id.*

Counsel contends that the district director failed to conduct adequate analysis or follow precedent law in denying the application, as required by the regulation at 8 C.F.R. § 3.1. *Attachment to Form I-290B*, received December 16, 2003. Counsel contends that the district director failed to address positive factors that weigh in favor of the applicant. *Id.* Counsel asserts that the district director disregarded the statement from the applicant's wife, and failed to analyze potential hardship to the applicant's children. *Id.* Counsel further asserts that the district director imposed a requirement that the applicant submit a psychological evaluation to show that his wife will experience emotional hardship. *Brief in Support of Appeal* at 13, dated November 25, 2003. Counsel contends that the loss of the applicant's income will cause his wife's and children's resources to drop below the poverty line. *Id.* Counsel states that the district director failed to examine the "'presumption of hardship' that many NACARA applicant's enjoy." *Id.* at 14.

Upon review, the applicant has failed to show that his wife or children will suffer extreme hardship should he be prohibited from remaining in the United States. The applicant's wife explains that the applicant is the primary income earner for their household. However, the record lacks a clear explanation or evidence of the applicant's current employment, and no indication of the amount of income he earns. Further, the applicant has not provided a clear account of his household's expenses, or his wife's present employment status or income. For example, while the record contains evidence that the applicant and his wife have car insurance, there is no documentation to reflect the amount of their premium, or whether they currently make payments on an automobile loan. The applicant has not indicated whether he and his wife have a mortgage for a home, or whether they make monthly rent payments. Thus, the AAO lacks sufficient information or documentation to assess the economic effect that the applicant's absence would have on his wife and children. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel states that the loss of the applicant's income will cause his wife's and children's resources to drop below the poverty line. Yet, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As the record reflects that the applicant's wife is capable of working and earning income, the applicant has failed to show that she will be unable to meet her and her children's financial needs in the applicant's absence.

The applicant's wife states that she and the applicant's children will experience emotional hardship should the applicant be compelled to depart the United States. However, the applicant's wife has only made general statements regarding emotional hardship, and she has not explained in detail the anticipated consequences. Thus, the applicant has not established that his wife or children will experience emotional consequences that go beyond those which are commonly experienced by the families of aliens deemed inadmissible. U.S. court decisions have held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec.

627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

Counsel asserts that the district director disregarded the statement from the applicant’s wife. However, given the very general nature of the statement from the applicant’s wife, and the lack of additional evidence or explanation regarding emotional hardship, the district director’s terse analysis was proper. Counsel suggests that the district director failed to analyze potential hardship to the applicant’s children. Yet, the record lacks a detailed explanation from the applicant or his family members regarding potential consequences for the applicant’s children, or other clear evidence of hardship they may endure. In the absence of such evidence, Citizenship and Immigrations Services (CIS) will not speculate as to what hardships may befall any qualifying family members. While counsel references a “presumption of hardship” found in proceedings under the Nicaraguan Adjustment and Central American Relief Act (NACARA), in proceedings for an application for a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361.

Counsel further asserts that the district director imposed a requirement that the applicant submit a psychological evaluation to show that his wife will experience emotional hardship. However, while the district director stated that “No psychological or financial evidence was submitted to support [the applicant’s wife’s] claim,” nothing in her decision imposes a psychological evaluation as a requirement for a waiver. The district director merely commented on the lack of evidence to support the application and the general statements of the applicant’s wife. The district director correctly cited the applicable law, and ultimately denied the application based on a failure to establish extreme hardship to a qualifying family member.

Counsel contends that the district director failed to conduct adequate analysis in denying the application, as required by the regulation at 8 C.F.R. § 3.1. *Attachment to Form I-290B*, received December 16, 2003. However, as discussed above, the applicant failed to submit detailed information or documentation to support that his wife or children will experience extreme hardship, and the director’s brief discussion is not deemed in error. The record contains little information on potential hardships for the district director to address. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Counsel contends that the district director failed to discuss positive factors that weigh in favor of the applicant, and that such balancing of positive and negative factors must be conducted before reaching an analysis of extreme hardship. However, a balancing of positive and negative factors is only performed when assessing whether the applicant warrants a favorable exercise of discretion. If an applicant fails to first establish that a qualifying relative will experience extreme hardship, the district director lacks discretion to approve a waiver application. *See* section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would have been served in discussing whether he merits a waiver as a matter of discretion. Thus, the director’s lack of discussion of factors that weigh in the applicant’s favor was proper.

Based on the foregoing, the applicant has not shown that, should he be prohibited from remaining in the United States, his family members will suffer hardship that is unusual or beyond that which would normally be expected upon deportation. Thus, the documentation in the record fails to establish the existence of extreme hardship to the applicant's wife or children caused by the applicant's inadmissibility to the United States.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.