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U.S. Citizenship
and Immigration
Services

[REDACTED]

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FILE:

[REDACTED]

Office: PORTLAND, OR

Date:

DEC 05 2008

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under § 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.


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Portland, Oregon. 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 Mexico who entered the United States without inspection in 1992. The applicant was found to be inadmissible to the United States pursuant to § 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 record indicates that the applicant is married to a U.S. citizen and that he is the beneficiary of an approved petition for alien relative. The applicant seeks a waiver of inadmissibility in order to reside with his wife in the United States.

The district director denied the application after finding that the applicant had failed to establish extreme hardship to his U.S. citizen spouse. *Decision of the District Director*, dated October 11, 2005. On appeal, counsel asserts that the applicant does not need a waiver under § 212(h) of the Act as he is not inadmissible, and submits a brief and additional evidence. *Form I-290B, Notice of Appeal to the Administrative Appeals Office*, dated November 10, 2005; *Counsel's brief*, dated November 11, 2005.

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.

The record reflects that the applicant was twice convicted of Attempted Burglary I under section 164.225 of the Oregon Revised Statutes (ORS). The applicant was placed on probation in both instances for periods of 24 months and 36 months respectively. The district director found that the offenses constituted crimes involving moral turpitude. However, the applicant asserts, through counsel, that the statute is divisible, and that the record is unclear as to whether his attempted burglary convictions were for crimes involving moral turpitude.

Section 164.225 of the ORS provides in pertinent part that:

- (1) A person commits the crime of burglary in the first degree if the person violates ORS 164.215 and the building is a dwelling, or if in effecting entry or while in a building or in immediate flight therefrom the person:
 - (a) Is armed with a burglary tool or theft device as defined in ORS 164.235 or a deadly weapon;
 - (b) Causes or attempts to cause physical injury to any person; or
 - (c) Uses or threatens to use a dangerous weapon.

Section 164.215 of the ORS provides in pertinent part that:

- (2) Except as otherwise provided in ORS 164.255, a person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime therein.

The AAO notes that the Board of Immigration Appeals (“Board”) defined moral turpitude as follows: moral turpitude is a nebulous concept, which refers generally to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general. *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), *aff’d*, 72 F.3d 571 (8th Cir. 1995); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *see also Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980); *Matter of McNaughton*, 16 I&N Dec. 569 (BIA 1978); *Matter of Baker*, 15 I&N Dec. 50 (BIA 1974); *Matter of S-*, 2 I&N Dec. 353 (BIA, A.G. 1945); *Matter of G-*, 1 I&N Dec. 73 (BIA, A.G. 1941). Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders the crime one of moral turpitude. *See Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of P-*, 6 I&N Dec. 795 (BIA 1955). The essence of moral turpitude is an evil or malicious intent. *Matter of Flores, supra*. The test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind. *See Matter of Winestock v. INS*, 576 F.2d 234 (9th Cir. 1978); *Matter of Flores, supra*. Where knowing or intentional conduct is an element of a morally reprehensible offense, we have found moral turpitude to be present. *See, e.g., Matter of Danesh, supra*.

A determination of whether an applicant has been convicted of a crime involving moral turpitude may be reached in one of two ways, described by the courts as the “categorical” and “modified categorical” approaches. The former looks solely at the structure of the statute of conviction to determine whether a person has been convicted of a designated crime; the latter, in cases where the status of conviction is facially over inclusive, considers a limited set of documents in the record of conviction to make this determination. *See, e.g., Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002).

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962), the court employs a modified categorical approach to determine whether the crime involves moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence; *Zaffarano v. Corsi*, 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang*, 175 F.Supp.2d 942, 950 E.D. Mich. 2001). A narrow, specific set of documents comprises the record: “[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005). The Ninth Circuit has further clarified that the charging document or information is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales*, 417 F.3rd 1022, 1028-29 (9th Cir. 2005). It is also important to note that the record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

In that the applicant in the present case was convicted under section 164.225 of the ORS, which is multi-sectional, the AAO will use the modified categorical approach in analyzing the applicant’s convictions to determine whether they render him inadmissible under section 212(a)(2)(i)(I) of the Act. Included in the record of conviction in this matter are the indictments, plea agreements, and sentences for both of the applicant’s convictions.

The Board stated in *Matter of Leyva*, 16 I&N Dec. 118 (BIA 1977), that a burglary with intent to commit theft is a crime involving moral turpitude. Citing *Matter of L-*, 6 I&N Dec. 666 (BIA 1955); *Matter of Z-*, 5 I&N Dec. 383 (BIA 1953). The applicant was convicted of attempted burglary in 1997 and 1998 under the section 164.225 of the ORS. With regard to his 1997 conviction, the record of conviction shows that the applicant was charged with one count of burglary in the first degree “with the intent to commit the crime of theft therein,” as well as three other related counts. However, the applicant pled no contest to Attempted Burglary I, rather than to any of the counts charged in the indictment. Accordingly, the record of conviction does not indicate that the applicant’s intent at the time of the attempted burglary was to commit theft and, therefore, does not demonstrate that his 1997 conviction was for a crime involving moral turpitude. However, on March 20, 1998, the applicant pled guilty to Count I of the indictment brought against him, which specifically charged him with attempted burglary in the first degree with “the intent to commit the crime of theft therein.”

The language of section 212(a)(2)(i)(I) of the Act says that it applies to any alien convicted of a crime involving moral turpitude or an attempt or conspiracy to commit such a crime. In that the Board in *Matter of Leyva* states that a burglary with intent to commit theft is a crime involving moral turpitude, the AAO finds that the applicant’s 1998 conviction for attempted burglary is a conviction for a crime involving moral turpitude. He is not eligible for the petty offense exception under section 212(a)(2)(ii)(II) of the Act as the maximum sentence for this offense is ten years in prison. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act and must seek a waiver of inadmissibility under section 212(h).

Section 212(h) states in pertinent part that:

(h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

(i) [T]he 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

(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.

Section 212(h) 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, i.e., the spouse, parent, son or

daughter of the applicant. Hardship to the applicant and other family members is not directly relevant and is not considered in section 212(h) proceedings, except to the extent that it affects a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

The record reflects that the applicant married a naturalized U.S. citizen on May 15, 2003. The applicant indicates that his mother is living nearby. However, the record does not show that the applicant's mother is a U.S. citizen or alien lawfully admitted for permanent residence. Therefore, the applicant's wife is the only qualifying family member in the instant case.

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. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals provides a list of factors relevant in determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, 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.

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). 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).

The AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Mexico or the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

Counsel contends that, if the applicant's spouse would suffer extreme hardship as a result of her relocating to Mexico. Counsel indicates that the applicant's spouse was born in Honduras, has lived in the United States since she was sixteen years old, and does not have ties to Mexico. Counsel asserts that the applicant's spouse is pursuing a degree in a community college and working on a part-time basis; and that her relocating to Mexico would completely interrupt her university studies and disrupt the continuity and professional development that she has established in her current workplace. The AAO notes that the record does not contain any documentary evidence showing that the applicant's spouse is pursuing a college degree.

Counsel states that, if the applicant's spouse moves to Mexico, her mother would suffer extremely and would have a very difficult time getting by on a daily basis and would be left with no family and a very minimal support system. The applicant's mother-in-law asserts in her statement, dated October 25, 2005, that if her daughter were forced to move to Mexico she would not be able to handle everyday tasks with her extremely limited English, and that the absence of her daughter would make her fall into depression and make her bad situation even worse. In support of this claim, the record contains a letter from the former supervisor of both the applicant's spouse and her mother verifying that the applicant's mother-in-law has limited English and needs her daughter's assistance in communicating. However, as previously noted, the applicant's mother-in-law is not a qualifying relative in this proceeding and the hardship she would experience as a result of the applicant's inadmissibility is not considered in section 212(h) waiver proceedings except to the extent that it results in hardship to the qualifying relative, the applicant's spouse. Although the applicant's spouse states that she would constantly worry about her mother because of her English language limitations, the AAO notes that the statement from the applicant's mother-in-law is in English and the record does not indicate that the statement was originally written in a language other than English and then translated into English or written in English with someone's assistance.

The applicant's spouse states that she has had two recent miscarriages, and suffers from depression. She contends that she will find it difficult to relocate to Mexico as she has never lived there. She further asserts that she will be at risk as a result of the high rate of crime and the flawed legal system in Mexico. The applicant's spouse also states that she will be unable to work, obtain health insurance or receive government help if she relocates.

The AAO notes that, in support of the claims made by the applicant's spouse, the record includes a November 7, 2005 letter from [REDACTED] indicating that the applicant's spouse is being treated for abdominal pain, possible ulcers, severe depression, General Anxiety Disorder, and frequent vomiting. Dr. [REDACTED] reports that the applicant's spouse has two miscarriages in 2004 and will need frequent visits and close monitoring and a cervical cerclage procedure for a future pregnancy. [REDACTED] states that a move out of the country would interrupt the applicant's spouse's medical treatments and cause significant stress. The record also contains a November 1, 2005 letter from [REDACTED] at Bend Obstetrics & Gynecology, LLC and medical reports dated October 12, 2004, October 29, 2004, April 26, 2005, October 4, 2005, and October 31, 2005. [REDACTED] also confirms the miscarriages suffered by the applicant's spouse and indicates that she will be at risk for future miscarriages. Should the applicant's spouse become pregnant, [REDACTED] states, she should undergo prophylactic placement of cervical cerclage and remain in bed. He further states that the applicant's spouse, during a future pregnancy, will be unable to work or maintain her household, and will require prophylactic steroid hormone treatment as well as possible hospitalization, intermittently or continuously, for management of preterm labor.

Counsel asserts that the applicant's mother would suffer extreme hardship if the applicant's spouse relocates to Mexico because her heart disease requires excellent medical care and her condition requires the support of the applicant's spouse. However, as previously noted, the record does not show that the applicant's mother is a U.S. citizen or alien lawfully admitted for permanent residence, and thus she is not a qualifying relative in this proceeding. Therefore, the hardship she would experience as a result of the applicant's inadmissibility is not considered in section 212(h) waiver proceedings except to the extent that it results in hardship to the

qualifying relative, the applicant's spouse. The applicant's mother states in her November 4, 2005 statement that she had a heart attack in December 2003 and, two months later, she suffered another heart attack. She states that she has been diagnosed with cardiac disease and Type 2 diabetes mellitus. She says that she would not be able to keep up the maintenance of her house, and would feel lonely and very depressed if the applicant's spouse relocates to Mexico with her son. In support of the claims made by the applicant's mother, the record includes medical reports dated December 3, 2003 and February 24, 2004 written by [REDACTED] at St. Charles Medical Center, indicating that the applicant's mother speaks little English and was treated for cardiac distress on these dates. The reports confirm a history of cardiac disease and the diagnosis of Type 2 diabetes for the applicant's mother. However, the record does not contain any documentary evidence to demonstrate the impact that the applicant's mother's health condition would have on his spouse if she relocates to Mexico.

Nevertheless, when considered in the aggregate and in light of the [REDACTED] factors previously cited, the AAO finds the evidence of record to establish that the applicant's spouse would suffer extreme hardship if she relocates to Mexico with the applicant.

Counsel also contends that the applicant's spouse would suffer extreme hardship if she remained in the United States following the applicant's removal as she would be unable to support herself or her family. He asserts that her monthly income is not sufficient to cover her and the applicant's monthly expenses or to continue to provide financial support to family members in Honduras. The applicant's spouse also asserts that she would be unable to cover her and the applicant's bills or financially assist her sisters in Honduras, one of whom suffers from idiopathic intracranial hypertension. She states that she is currently under treatment for her depression and that the applicant's absence would make her depression unbearable.

Were she to become pregnant, the applicant's spouse states, she would require the applicant's help for the hard physical work around the house and for money to pay their bills. As previously noted, the record contains a letter dated November 7, 2005 from [REDACTED] which indicates that the applicant's spouse is under treatment for abdominal pain, ulcers, severe depression, General Anxiety Disorder and frequent vomiting. A letter dated November 1, 2005 from [REDACTED] confirms that the applicant's spouse will require significant medical support if she is to carry a child to term.

The AAO finds that when considered in the aggregate, the preceding factors establish that the applicant's spouse would suffer extreme hardship if the applicant were denied admission to the United States. The suffering experienced by the applicant's spouse would surpass the hardship typically encountered in instances of separation.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether ... relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws,

the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the applicant's U.S. citizen spouse, the approved Form I-130 benefiting him, extreme hardship to the applicant's spouse, the passage of more than ten years since the applicant's crimes, the absence of subsequent criminal violations, and the applicant's involvement in his local community, as demonstrated by the letters of support contained in the record. The unfavorable factors in this matter are the applicant's convictions, his entry without inspection into the United States and his subsequent unlawful residence.

The AAO finds that the violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that, taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), 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. **Here, the applicant has met that burden. Accordingly, the appeal will be sustained.**

ORDER: The appeal is sustained.