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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: CHICAGO, ILLINOIS Date: SEP 02 2009

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 PETITIONER:

[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 District Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Honduras who has resided in the United States since 1989, when he entered without inspection. He was found to be inadmissible under 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 (theft). The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his spouse and 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 accordingly. *See Decision of District Director* dated March 14, 2006.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) failed to make a clear and concise finding that the applicant is inadmissible for having been convicted of a crime involving turpitude when some of the convictions might fall within the petty offense exception. *See Form I-290B, Notice of Appeal to the AAO.* Counsel further asserts that that the evidence on the record establishes that the applicant's wife and children would suffer extreme hardship if he were removed from the United States, and USCIS acted arbitrarily and capriciously in denying the waiver application. *Id.* In support of the waiver application, counsel submitted affidavits from the applicant and his wife, letters and affidavits from friends and relatives of the applicant and his wife, letters from the applicant's employers and his wife's employer, and insurance and financial documents including bills and bank statements. The entire record was reviewed and considered in arriving at a 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.
>
> (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).

Section 212(h) states in pertinent part:

> 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]his 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.

The applicant was convicted of retail theft on October 24, 2005 and on December 22, 1998 in Cook County, Illinois in violation of Illinois Statute § 5/16A-3a and was also convicted of theft of labor or services on February 6, 1998 in Cook County, Illinois. Section 5/16A-3 of the Illinois Statutes provides, in pertinent part:

> § 16A-3. Offense of Retail Theft. A person commits the offense of retail theft when he or she knowingly:
> (a) Takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise.

In *Matter of Grazley,* the BIA held that theft is a crime involving moral turpitude when a permanent taking is intended. *Matter of Grazley,* 14 I&N Dec. 330 (BIA 1973); *Matter of N*, 7 I&N Dec. 356 (BIA 1956)("Moral turpitude exists where there is a taking with intent to permanently deprive the owner of property."); *Matter of T*, 3 I&N Dec. 641 (BIA 1949).

The applicant was convicted twice of retail theft under section 5/16A-3a of the Illinois Statutes, which requires the intent to retain or deprive the merchant permanently of the possession of the merchandise. In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. If a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." *Matter of Silva-Trevino,* 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. In all such inquiries, the burden is on the alien to establish "clearly and beyond doubt" that he is "not inadmissible." *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008)).

Because *Matter of Silva-Trevino* was decided after the applicant submitted the present appeal, the AAO provided the applicant an opportunity to submit additional documentation such as an indictment, judgment of conviction, jury instructions, a signed guilty plea, or plea transcript, or other evidence deemed necessary or appropriate to resolve accurately whether he was convicted of conduct not involving moral turpitude. Neither the applicant nor counsel for the applicant responded to the request for further documentation. The AAO must therefore determine, based on the documentation on the record, that the applicant's convictions for retail theft are for crimes involving moral turpitude. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and since he was convicted of more than one crime involving moral turpitude, the applicant does not qualify for the exception in section 212(a)(2)(A)(ii) of the Act. The offenses for which the applicant was convicted took place in 1997 or later. Since less than fifteen years has passed since the conduct for which the applicant was convicted, he is not eligible for a waiver under section 212(h)(1)(A) of the Act, but may seek a waiver under section 212(h)(1)(B) 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.

U.S. court decisions have additionally 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA 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, in *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the court 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. In *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968), the BIA held that separation of family members and financial difficulties alone do not establish extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

In the present case, the record reflects that the applicant is a thirty-eight year-old native and citizen of Honduras who has resided in the United States since 1989, when he entered the country without inspection. The applicant's wife is a twenty-eight year-old native and citizen of the United States whom the applicant married on April 12, 2001. The applicant and his wife currently reside in Chicago, Illinois, with their nine year-old daughter. The AAO notes that the applicant has two other U.S. Citizen children, but the waiver application does not indicate where they reside.

The applicant's wife asserts that she and her daughter would suffer extreme hardship if they relocated to Honduras. She states that she and her daughter do not speak Spanish fluently and would not be able to adjust, and they would not have family and friends there as they do in the United States. *Undated letter from* [redacted] She further states that they would be at risk of being infected with deadly diseases and would have no medical insurance to pay for treatment in Honduras. *Id.* Further, she states that the applicant would be unable to find employment as a roofer, his occupation in the United States, because roofing is constructed differently in Honduras and his experience would not help him obtain a job. *Id.* The applicant additionally states that the crime rate is very high in Honduras, and he and his family would be at risk because violent gangs, or "maras" in Honduras target individuals from the United States for kidnapping for ransom. *Undated letter from the applicant submitted with I-601 application.*

In the present case, the record reflects that the applicant's daughter is ten years old, has spent her entire life in the United States and is not fluent in Spanish. Court decisions have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. In *Ramos v. INS,* 695 F.2d 181, 186 (5th Cir. 1983), the circuit court stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. In *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit found that the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

The AAO further notes that the Temporary Protected Status (TPS) designation for Honduras was extended by the Secretary of Homeland Security until July 5, 2010. The Federal Register Notice extending the TPS designation states the following:

> It is estimated that Hurricane Mitch destroyed from 80,000 to over 200,000 dwellings in Honduras. By 2004, the United States Agency for International Development had completed construction of 6,100 permanent housing units . . . . By 2005, nongovernmental organizations had repaired or built over 15,000 housing units. However, much of this housing still lacks water and electricity. The Honduran government said in May 2006 that more than 600,000 Hondurans live in areas that are at high risk of flooding. As of June 2008, the European Union's Regional Program for the Reconstruction of Central America (PRRAC) housing rehabilitation program is nearing completion. The PRRAC program for water projects costing $30 million is also nearing completion. However, the drinking water systems and supplies of many Honduran communities still remain contaminated. Based upon this review, the Secretary has determined . . . [that t]here continues to be a substantial, but temporary, disruption in living conditions in Honduras as the result of an environmental disaster, and Honduras continues to be unable, temporarily, to adequately handle the return of its nationals. *Extension of the Designation of Honduras for Temporary Protected Status,* 73 Fed. Reg. 57133, 57134 (October 1, 2008).

When considered in the aggregate and in light of current conditions in Honduras, the hardship to the applicant's daughter resulting from separation from her relatives in the United States and having to attend school in Spanish and adjust to conditions in Honduras would constitute extreme hardship.

The applicant's wife states that she would suffer extreme emotional and economic hardship if she and her daughter remained in the United States and the applicant were removed from the country. She states that the applicant is the main provider for the family and her salary alone would not cover all of their living expenses. *Undated letter from* [redacted] She further states that she would have difficulty raising her child alone and fears her daughter would be at a high risk of dropping out of school or becoming pregnant as a teenager if she is raised without a father. *Id.* She further states that their daughter adores the applicant and they spend a lot of time together as a family and do not want to be separated, and requests that they be allowed to stay together where they have built their home and family. *Id.*

The applicant asserts that his wife and daughter would suffer extreme emotional hardship if he is removed from the United States, but there is no evidence on the record concerning any emotional hardship they would suffer, such as evidence concerning their mental health or the potential emotional or psychological effects of the separation. The evidence on the record does not establish that the emotional effects of separation from the applicant would be more serious than the type of hardship a family member would normally suffer when faced with the prospect of a spouse's or parent's removal or exclusion. Although the depth of their distress over the prospect of being separated from the applicant is not in question, a waiver of inadmissibility is available only where the resulting hardship would be unusual or beyond that which would normally be expected upon removal or exclusion. The prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families. But in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme* hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists.

The applicant further asserts that his wife would be unable to support herself and their daughter without his income if he is removed from the United States, and states that they have two car loans, rent, insurance, credit card debt, and other bills that she would be left to pay on her own. *Undated letter from the applicant submitted with I-601 Application.* In support of this assertion he submitted a copy of their automobile insurance policy, copies of their mobile phone bills, credit card statements, and a letter from their landlord. Letters from their employers were also submitted, though the letter from the applicant's wife's employer does not indicate how much she earns. Although it appears that the loss of the applicant's income would have a negative impact on the financial situation of his wife and daughter, there is no indication that there are any unusual circumstances that would cause financial hardship beyond what would normally be expected as a result of the applicant's removal. The financial impact of the loss of the applicant's income therefore appears to be a common result of exclusion or deportation, and would not rise to the level of extreme hardship for the applicant's wife and daughters. *See INS v. Jong Ha Wang, supra* (holding that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship).

The emotional and financial hardship the applicant's wife and daughter would experience if the applicant is removed and they remain the United States appears to be the type of hardship that a family member would normally suffer as a result of deportation or exclusion. U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Perez v. INS,* 96 F.3d 390 (9th Cir. 1996) (defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation); *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship).

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relatives, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. Citizen spouse or children as required under section 212(h) of the Act.

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. 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.