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

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: WASHINGTON, D.C. Date: MAY 07 2010

IN RE: Applicant: [redacted]

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

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).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Peru. The director stated that the applicant was 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 committing crimes involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel contends that the applicant is married to a naturalized citizen of the United States with whom he has three U.S. citizen children. He states that the applicant's wife is not working as she is taking care of their children, including their six-month-old baby. Counsel asserts that the applicant would have qualified for cancellation of removal under section 240 of the Act and in light of the interpretation of that section by the Board of Immigration Appeals (BIA) in *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002). Counsel declares that the hardship standard for cancellation of removal is much higher than for a section 212(h) waiver, yet in *Recinas* the BIA found that a single mother with four U.S. citizen children established that her deportation would result in their "exceptional and extremely unusual hardship." Counsel asserts that the suffering of the applicant's four qualifying relatives exceeds the suffering usually associated with removal and that when their suffering is combined with the applicant's wife's inability to work and support their children, extreme hardship is established in the event of the applicant's removal.

Section 212(a)(2) of the Act states 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.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present.

> However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

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. In evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

The record shows that on November 16, 2001, the applicant committed the offenses of misdemeanor uttering in violation of section 18.2-181 of the Code of Virginia Annotated and petit larceny in violation of Va. Code Ann. § 18.2-96. The judge convicted the applicant of the offenses, and ordered that he concurrently serve 180 days in jail for each offense, of which 150 days were suspended.

Va. Code Ann. § 18.2-181, Issuing bad checks, etc., larceny provides:

> Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for the payment of money, upon any bank, banking institution, trust company, or other depository, knowing, at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in, or credit with, such bank, banking institution, trust company, or other depository, for the payment of such check, draft or order, although no express representation is made in reference thereto, shall be guilty of larceny; and, if this check, draft, or order has a represented value of $200 or more, such person shall be guilty of a Class 6 felony. In cases in which such value is less than $200, the person shall be guilty of a Class 1 misdemeanor.
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> . . .
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> Any person making, drawing, uttering or delivering any such check, draft or order in payment as a present consideration for goods or services for the purposes set out in this section shall be guilty as provided herein.

The AAO is unaware of any published federal cases addressing whether the crime of issuing a bad check under Virginia law is a crime of moral turpitude. However, in *Matter of Kahlek*, the BIA stated that "where a statute that includes intent to defraud as an essential element of a bad check offense, the crime is one involving moral turpitude." 17 I&N Dec. 518, 519 (BIA 1980). In that

intent to defraud is an essential element for the offense of issuing a bad check, the AAO finds that the crime of which the applicant was convicted under Va. Code Ann. § 18.2-181 involves moral turpitude.

The applicant was convicted of petit larceny under Va. Code Ann. § 18.2-96. That section provides:

> Any person who:
> 1. Commits larceny from the person of another of money or other thing of value of less than $5, or
> 2. Commits simple larceny not from the person of another of goods and chattels of the value of less than $200, except as provided in subdivision (iii) of § 18.2-95, shall be deemed guilty of petit larceny, which shall be punishable as a Class 1 misdemeanor.

In determining whether theft is a crime of moral turpitude, the BIA considers "whether there was an intention to permanently deprive the owner of his property." *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). In *Foster v. Commonwealth*, 44 Va.App. 574, 606 S.E.2d 518, Va.App. (2004), the Court of Appeals of Virginia stated that petit larceny in Virginia is a common law crime that has been defined by case law as "the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently." (citations omitted). *Id.* at 577-81. In view of the fact that conviction for petit larceny under Va. Code Ann. § 18.2-96 requires proving an intention to permanently deprive the owner of his property, the AAO finds that the offense of which the applicant was convicted under Va. Code Ann. § 18.2-96 involves moral turpitude.

On September 6, 2005, the judge convicted the applicant of false identification in violation of Va. Code Ann. § 18.2-204.1, a misdemeanor, and ordered that he pay a fine.

Va. Code Ann. § 18.2-204.1 provides:

> A. It shall be unlawful for any person to obtain, possess, sell, or transfer the birth certificate of another for the purpose of establishing a false identity for himself or for another person.
>
> B. It shall be unlawful for any person to obtain, possess, sell, or transfer any document for the purpose of establishing a false status, occupation, membership, license or identity for himself or any other person.
>
> C. Any person who violates the provisions of this section is guilty of a Class 1 misdemeanor . . .

We are unaware of any published federal cases addressing whether the crime of false identification under Virginia law is a crime of moral turpitude. However, in *Matter of Serna,* 20 I&N Dec. 579 (BIA 1992), the BIA held that "possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude." Furthermore, in *Matter of Flores,* 17 I&N Dec. 225, 230 (BIA 1980),

the BIA held that uttering and selling false or counterfeit paper related to the registry of aliens was a crime involving moral turpitude, even though intent to defraud was not an explicit statutory element. We note that, by its terms, Va. Code Ann. § 18.2-204.1 applies to the possession of legitimate documents in addition to altered or counterfeit ones. What it punishes is the possession of documents, valid or not, for the purpose of establishing something false, be it a false identity, status, occupation, membership, or license. Therefore, in view of the holdings in *Serna* and *Flores*, we find that because Va. Code Ann. § 18.2-204.1 requires the specific intent to use a document for a false purpose, a conviction under this statute "is accompanied by a vicious motive or corrupt mind" and is thus a crime involving moral turpitude. *See, e.g., Omagah v. Ashcroft*, 288 F.3d 254, 262 (5th Cir. 2002) (finding that crimes that do not involve fraud, but that include "dishonesty or lying as an essential element" also tend to involve moral turpitude); *see also Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) ("Generally a crime involving dishonesty or false statement is considered to be one involving moral turpitude."). Even were we not to find that the applicant's conviction is categorically a crime involving moral turpitude, the modified categorical approach reveals that the applicant was charged with and convicted of possessing a "fraudulent Resident Alien Card, for the purpose of establishing a false status, occupation, membership, license, or identity." In that the applicant possessed the fraudulent Resident Alien Card with the specific purpose of using it, his conviction is a crime involving moral turpitude pursuant to the holding in *Serna*.

On April 19, 2010, in Virginia, the applicant was convicted of the offense of felony driving under the influence (third offense in 10 years) and was sentenced to serve 2.5 years in jail. We note that the AAO has not yet obtained the applicant's final sentence order. Va. Code Ann. § 18.2-266 provides that it is unlawful for any person to drive or operate any motor vehicle "[w]hile such person has a blood alcohol concentration of .08% or more . . . . or while such person is under the influence of alcohol, or such person is under the influence of any narcotic drug or any other self administered intoxicant."

Although the AAO is unaware of any published federal cases addressing whether the crime of felony driving under the influence (third offense in 10 years) in Virginia is a crime of moral turpitude, there is a BIA case that is relevant to this issue. In *In re Torres-Varela,* the applicant had been convicted under section 28-697(A)(2) of the Arizona Revised Statutes for aggravated driving under the influence. The aggravating factor under section 28-697(A)(2) of the Arizona Revised Statutes is an individual's having previously been convicted of simple driving under the influence two times within 60 months. 23 I&N Dec 78, 85 (BIA 2001). The BIA held that simple driving under the influence, the underlying crime under section 28-697(A)(2) of the Arizona Revised Statutes, is not a crime involving moral turpitude, and aggregating multiple convictions for simple driving under the influence does not convert the offense into a crime involving moral turpitude. 23 I&N Dec 78, 85-86. Conversely, we note that the BIA held in *In re Lopez-Meza,* 22 I&N Dec. 1188 (1999), that aggravated driving while intoxicated under Arizona law involves moral turpitude because the State must prove that a person drove under the influence of alcohol, knowing that his or her driver's license was suspended, canceled, revoked, or refused and that he or she was therefore not permitted to drive.

In view of the fact that the applicant was convicted of felony driving under the influence, of which underlying offense is in essence multiple convictions of simple driving under the influence, and in light of the holding in *Torres-Varela,* the applicant's conviction does not involve moral turpitude.

We note, however, that the record shows that the applicant had a hearing on January 14, 2003, for a charge of reckless driving and driving under a revoked/suspended license. Although the applicant submitted a document by the Fairfax Country Police Department relating to a driving while intoxicated offense committed on December 29, 2003, he did not submit any court records of the disposition of the reckless driving or driving under revoked/suspended license charges. Nevertheless, because we have determined that the applicant was convicted of three crimes involving moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we need not address the reckless driving and driving under a revoked/suspended license arrests.

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
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> . . .
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> (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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives here are the applicant's naturalized citizen spouse, and his U.S. citizen children. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship a qualifying relative pursuant to section 212(i) of the Act. 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.* at 565-566.

In *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in

determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Extreme hardship to the applicant's qualifying family member must be established in the event that they join him to live in Peru, and alternatively, if they remain in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

With regard to joining the applicant to live in Peru, the record contains a history of Peru by Wikipedia, articles by El Diario International and the British Broadcasting Corporation, an unemployment chart, a U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2003*: *Peru* (February 25, 2004), and other documentation. Although we acknowledge the relevancy of such documentation in describing conditions in Peru, we find that the submitted documentation is outdated in that it fails to reflect the social, economic, and political environment in Peru as of the date of the appeal. In addition, the applicant makes no claim that his wife and children will experience extreme hardship if they joined him to live in Peru.

With regard to remaining in the United States without the applicant, the applicant's wife states in her affidavit dated April 3, 2008 that her husband is involved in taking care of their young children. She avers that she stays at home to take care of their newborn while her husband works to support them, earning $500 every week. She asserts that they have two car loans totaling $12,500 and that they live with her parents. The applicant's wife indicates that the children have a close relationship with the applicant, and that she is concerned they will be fatherless if separated from him. The applicant conveys in his affidavit dated April 3, 2008, that his family has monthly expenses of $1,900 and his income is $1,800 after taxes, so they borrow from family members and use credit cards for the shortfall. He asserts that his wife and children will be without any income if he is removed from the United States. Letters in the record by the head start teacher and the family service coordinator confirm that the applicant is involved in the care of his children. The income tax records for 2007 reflect that the applicant earned $11,994 in income and his wife earned $11,963. The record contains photographs and billing statements, including a loan statement reflecting balance due of $11,373.

Family separation must be considered in determining hardship. In *Salcido-Salcido v. INS,* 138 F.3d 1292 (9th Cir. 1998) the Ninth Circuit discussed the effect of emotional hardship on the alien and her husband and children as a result of family separation. The Ninth Circuit stated that "the most important single hardship factor may be the separation of the alien from family living in the United States" and that there must be a careful appraisal of "the impact that deportation would have on children and families." *Id.* at 1293. Furthermore, the Ninth Circuit indicated that "considerable, if not predominant, weight," must be attributed to the hardship that will result from family separation. *Id.* In *Yong v. INS*, 459 F.2d 1004 (9th Cir. 1972), the Ninth Circuit reversed a BIA decision denying an application for suspension of deportation, noting that "[s]eparation from one's spouse entails substantially more than economic hardship." *Id.* at 1005. Similarly, the Third Circuit in

Bastidas v. INS, 609 F.2d 101 (3rd Cir.1979) explicitly stressed the importance to be given the factor of separation of parent and child.

The AAO notes that in view of the substantial weight that is given to family separation in the hardship analysis, and in light of the significant emotional and financial impact that the applicant's wife indicates that separation from the applicant will have on her and on their young children, we find the applicant has demonstrated that the hardship that his wife and children will experience as a result of separation is extreme.

The applicant has demonstrated extreme hardship to his wife and children if they remained in the United States without him. However, he has not shown his wife and children will experience extreme hardship if they joined him to live in Peru.

Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under sections 212(h) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.