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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

Date: MAY 24 2011 Office: MIAMI, FL FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica 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 committed a crime 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 remain in the United States with her U.S. citizen daughter, fiancé, and lawful permanent resident father.

In a decision, dated August 22, 2008, the district director concluded that the applicant did not provide any evidence that her father would suffer extreme hardship, that her daughter could not reside in Jamaica with her, or that her father could not visit the applicant and his granddaughter in Jamaica. The waiver application was denied accordingly.

On appeal, counsel asserts that the applicant's daughter was born with a heart defect, requires continued medical care, cannot receive this kind of care in Jamaica, and the applicant cannot financially care for her daughter in Jamaica. She states that the applicant's child would suffer extreme hardship and actual injury if the applicant's inadmissibility is not waived. Counsel states the applicant's daughter's medical records are attached.

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

> (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-
>
> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (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).

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.)

The record shows that the applicant was arrested in Broward County Florida on February 1, 2006 and charged with grand theft in the third degree. The applicant, who was born on June 26, 1986, was 19 years old at the time she committed the crime that resulted in her arrest.

The record shows that the applicant was convicted in the Seventeenth Judicial Circuit Court, Broward County, Florida, on August 11, 2006 of grand theft in the third degree in violation of section 812.014(2)(c)(1) of the Florida Statutes. Grand theft of the third degree is a third degree felony punishable by a maximum of five years imprisonment. Fl. Stat. § 775.082(3)(d). The applicant was placed on probation for a period of 18 months.

At the time of the applicant's conviction, Fl. Stat. § 812.014(2)(c)(1) provided, in pertinent parts:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
>
> (2) . . .
>
> (c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:
>
> (1) Valued at $300 or more, but less than $5,000. . . .

In *Matter of Silva-Trevino* the Attorney General adopted the "realistic probability" standard articulated by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), as an approach for determining inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. *See* 24 I&N Dec. 687, 698 (2008).

The methodology articulated by the Attorney General for determining whether a conviction is a crime involving moral turpitude requires an adjudicator to review 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. at 193). 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. . . . ." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

Several U.S. Courts have distinguished the realistic probability test articulated in *Duneas-Alvarez* in cases where "a state statute explicitly defines a crime more broadly than the generic definition" and "no 'legal imagination,' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007)(citing *Duenas-Alvarez,* 127 S.Ct. at 822). In *United States. v. Vidal*, the Ninth Circuit Court of Appeals determined that a "realistic probability" that the theft statute under which the alien was convicted would be applied to conduct that falls outside the generic definition of theft could be found in the plain text of the statute. 504 F.3d 1072, 1082 (9th Cir. 2007). The Ninth Circuit noted that "when '[t]he state statute's greater breadth is evident from its text,' a defendant may rely on the statutory language to establish the statute as overly inclusive." *Id.* (citing to *United States v. Grisel,* 488 F.3d at 850.).

In the instant case, the statute under which the applicant was convicted, Fl. Stat. § 812.014, involves both temporary and permanent takings. A plain reading of Fl. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). Therefore, the AAO cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, we will apply the modified categorical approach and engage in a second-stage inquiry by reviewing the record of conviction to determine if the conviction was based on conduct involving moral turpitude. *Silva-Trevino* 24 I&N Dec. at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708. The record of conviction in this case includes the charging document filed by the state prosecuting attorney, which provides that the applicant was charged with the following:

> [redacted] on the 1st day of February, A.D. 2006, in the County and State aforesaid, did then and there unlawfully and knowingly obtain or endeavor to obtain the property of Macy's, to-wit: merchandise, of the value of three hundred dollars ($300.00) or more, but less than five thousand dollars ($5,000.00), with the intent to either temporarily or permanently deprive Macy's of the right to the property or a

> benefit from the property, or to appropriate the property to her own use or the use of any person not entitled to the use of the property. . . .

In *In re Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The reasoning in *Jurado-Delgado* is applicable to the present case. Based on the evidence in the record, the AAO finds that the applicant's crime was retail theft. She was thus convicted of knowingly taking the property of another with intent to permanently deprive that person of the property, a crime involving moral turpitude, and is inadmissible 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), (B), . . . of subsection (a)(2) . . . if –
>
> . . . .
>
> (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 waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's father and daughter are the only qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

In support of the waiver application, the record contains, but is not limited to: counsel's brief; affidavits from the applicant, the applicant's fiancé, and the applicant's father; a letter from the applicant's doctor; medical records for the applicant's daughter; and country condition information for Jamaica. The entire record has been reviewed in rendering a decision on the appeal.

In her brief, dated October 20, 2008, counsel states that on November 27, 2005 the applicant's daughter was born with a hole in her heart and is currently under the care of pediatric cardiologists. Counsel states that the applicant is a single parent to her daughter, who requires yearly check-ups to determine if the hole in her heart will close on its own or will require surgery. Counsel states that the applicant is also pregnant with her second child and due on March 26, 2009. She states that the applicant is engaged to the father of this child, who also acts as a surrogate father to her first child. Counsel states that the applicant's daughter is very close with her grandparents and that she does not have a relationship with her biological father.

Counsel also states that the applicant's mother resides in Jamaica, but is very poor and would not be able to help her daughter and her children. She states that the applicant's mother lives with the applicant's stepfather and eight children in two, one bedroom apartments. She states that the applicant's daughter's financial future in Jamaica would be very uncertain because she has nowhere to live, she has only a high school education, she has never worked in Jamaica, and the minimum

wage in Jamaica is $42.00 per week. Counsel also states that the applicant's father lives pay check to pay check and would not be able to help her financially upon her relocation.

Counsel states further that in the event the applicant and her daughter must relocate, both the applicant's daughter and the applicant's father would be emotionally devastated as a result of being separated from each other. Moreover, counsel expresses concern over the applicant's daughter's medical condition, her need to stay on a healthy diet as well as be medically monitored, and her ability to be able to access medical care while in Jamaica. Counsel also notes that the applicant's daughter's education would suffer upon relocation and that her family is not a wealthy family that could travel back and forth from Jamaica to see each other.

The AAO notes that the record includes affidavits from the applicant, the applicant's father, and the applicant's fiancé which support the statements made by counsel. In addition, the record includes copies of letters from the applicant's daughter's pediatric heart specialist to the applicant's daughter's pediatrician. These letters indicate that the applicant's daughter has a small atrial septal defect which needs to be checked yearly. The AAO notes that as of November 6, 2007 the applicant's daughter continued to have this heart defect. The record also includes a note from Jackson North Specialty and Diagnostic Center, dated October 14, 2008, stating that the applicant was pregnant and would be expected to deliver on or about March 26, 2009.

In support of the statements regarding conditions in Jamaica, the record includes the U.S. State Department Country Information Sheet for Jamaica and the 2007 U.S. State Department Country Report on Human Rights Practices in Jamaica. These reports indicate that violent crime is a serious problem in Jamaica with crime being exacerbated by an understaffed and ineffective police force. The reports also state that medical care is more limited in Jamaica than in the United States. The report on human rights practices indicates that social and cultural traditions perpetuate violence against women in Jamaica and that violence against women is widespread. The report also states that in practice women are discriminated against in the workplace and often earn less than their male counterparts. This report supports counsel's statement regarding the minimum wage in Jamaica being $42 per week for all workers except private security guards. The AAO notes that because the applicant only has a high school education it is not unreasonable to believe that she would be subject to low wages upon finding employment in Jamaica.

The AAO finds that the applicant's daughter would suffer extreme hardship as a result of the applicant's inadmissibility. Upon relocating to Jamaica, the applicant's daughter, who is currently five years old and suffers from a heart defect requiring yearly check-ups, would suffer extreme hardship as a result of relocation. The applicant's daughter would be separated from the only father she knows, as well as her grandparents. The record indicates that the applicant's spouse is unlikely to find employment paying a living wage in Jamaica, she would possibly face discrimination as a woman in Jamaica, she would receive little to no financial help from her family there, and the medical care for her daughter would be limited. Given that the applicant is only five years old and wholly dependant on her mother for care, the above stated factors, taken in the aggregate, would amount to extreme hardship for the applicant's daughter.

Furthermore, the AAO finds that separating a five-year-old child from her mother under the unique circumstances of this case also amounts to extreme hardship. The AAO therefore finds that the

applicant has established that her daughter would suffer extreme hardship if her waiver of inadmissibility is denied.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien 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 section 212(h)(1)(B) 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-Moralez, 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 adverse factor in the present case is the applicant's 2006 conviction for grand theft.

The favorable factors in the present case are the extreme hardship to the applicant's daughter; the applicant's family ties to the United States; the fact that the applicant was only 19 years old when she committed the offense that led to her conviction, the applicant's lack of immigration violations in the United States; and her lack of a criminal record since 2006.

The AAO finds that the crime committed by the applicant is 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. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.