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



**U.S. Citizenship
and Immigration
Services**

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Date: **MAY 25 2011**

Office: MOSCOW

FILE: 

IN RE: 

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:



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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

f Perry Rhew
Chief, Administrative Appeals Office

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

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

In a decision, dated April 16, 2010, the field office director found that the applicant had shown that his inadmissibility is having an adverse effect on his spouse, but that the hardship faced by his spouse does not rise to the level of extreme hardship. The field office director also found that the applicant's waiver would not be granted as a matter of discretion. In addition, the field office director states that the applicant was previously removed as an aggravated felon under section 212(a)(9)(A)(i) of the Act.

In a subsequent decision, dated January 27, 2011, related to a second waiver application filed on November 10, 2010, the field office director found that the applicant had established that his spouse would suffer extreme hardship if she chose to relocate to Russia, but that extreme hardship to his spouse was not shown in the event of separation. The waiver application was denied accordingly.

In an attachment to the Notice of Appeal to the AAO (Form I-290B), dated May 11, 2010, counsel states that the applicant was removed from the United States under section 237(a)(2)(A) as someone who has been convicted of two or more crimes involving moral turpitude and as someone who has within five years of his date of admission been convicted of a crime involving moral turpitude for which a sentence of one year or more could have been imposed. Counsel also states that the applicant has three convictions, not four, as stated by the field office director. Finally, counsel states that the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility.

The AAO notes that the decision by the field office director, dated April 16, 2010, incorrectly states that the applicant was removed from the United States as an aggravated felon.

In a second Form I-290B, dated February 22, 2011 and filed as an appeal on the field office director's January 27, 2011 decision, counsel addresses the field office director's finding that the applicant's spouse would not suffer extreme hardship as a result of separation. He states that the applicant's spouse has been separated from the applicant since 2007 and that she is suffering from a chronic and debilitating condition that is compounded in its severity by being separated from the applicant.

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 indicates that on May 7, 1995 the applicant was convicted of petty theft in violation of California Penal Code section 484(a); on March 6, 1996, the applicant was convicted of robbery in violation of California Penal Code section 211; and on April 5, 1998 the applicant was again convicted of petty theft under California Penal Code section 484(a).

The AAO notes that the applicant's 1996 and 1998 convictions were expunged in 2007. However, these convictions will remain convictions for immigration purposes. Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent,

rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In *Matter of Pickering*, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes. 23 I&N Dec. 621, 624 (BIA 2003). There is nothing in the record to show that the expungement of the applicant’s convictions was based on a defect in the convictions or in the proceedings underlying the convictions. Thus, the applicant remains “convicted” within the meaning of section 101(a)(48)(A) of the Act.

Cal. Penal Code § 484(a) provides:

- (a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, “It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . .”); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, “Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].”) However, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Ninth Circuit Court of Appeals addressed the issue of whether Cal. Penal Code § 484(a) constitutes a crime involving moral turpitude in *Castillo-Cruz*. See 581 F.3d at 1157. The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a) and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). The Ninth Circuit cited to the California Second District Court of Appeal’s opinion in

People v. Albert, which held that the act of robbery, defined by the court as “larceny aggravated by use of force or fear,” requires an intended permanent taking. *Id.* (citing 47 Cal.App.4th 1004, 1007 (1996)). The Second District Court of Appeal emphasized that absent this specific intent, the taking of the property of another is not theft. 47 Cal.App.4th at 1008. Therefore, the AAO finds that a conviction for theft under Cal. Penal Code § 484(a) is categorically a crime involving moral turpitude because it requires the permanent intent to deprive the victim of his or her property. Thus, the applicant’s two convictions for petty theft are crimes involving moral turpitude.

In addition, the AAO also finds that robbery has consistently been held to be a crime involving moral turpitude as the force or threatened force against the person of the victim and the intent to deprive him of his property unlawfully both supply the element of "evil intent." *Matter of Martin*, 18 I. & N. Dec. 226 (BIA 1982) (Colorado law); *Matter of Carballe*, 19 I. & N. Dec. 357 (BIA 1986) (Florida Statute); *Ashby v. INS*, 961 F.2d 555 (5th Cir. 1992); *Matter of Burbano*, Int. Dec. 3229 (BIA 1994). Therefore, the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(I), for having committed three crimes involving moral turpitude.

Section 212(h) of the Act provides, in pertinent part:

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

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien’s applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Because only two of the three criminal convictions for which the applicant was found inadmissible occurred more than 15 years ago, his inadmissibility cannot be waived under section 212(h)(1)(A) of the Act. The applicant is eligible to apply for a waiver of his ground of inadmissibility under section 212(h)(1)(B) of the Act.

However, even if the applicant were able to satisfy the requirements of section 212(h)(1)(B) of the Act, his waiver application would not be granted as the AAO finds that he is not deserving of a favorable exercise of the Secretary's discretion as he has been convicted of a violent or dangerous crime and is subject to section 212.7(d) of the Act. For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 299 (BIA 1996). The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependant on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings,

and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual “case-by-case basis.” 67 Fed. Reg. at 78677-78.

The AAO finds that robbery is a violent and dangerous crime, and is thus subject to the heightened discretionary standard under 8 C.F.R. § 212.7(d).

Accordingly, the applicant must show that “extraordinary circumstances” warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant’s admission would result in exceptional and extremely unusual hardship. *Id.* Finding no evidence of foreign policy, national security, or other extraordinary equities, the AAO will consider whether the applicant has “clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship” to a qualifying relative. *Id.*

In *Matter of Monreal-Aguinaga*, 23 I& N Dec. 56, 62 (BIA 2001), the BIA determined that exceptional and extremely unusual hardship in cancellation of removal cases under section 240A(b) of the Act is hardship that “must be ‘substantially’ beyond the ordinary hardship that would be expected when a close family member leaves this country.” However, the applicant need not show that hardship would be unconscionable. *Id.* at 61. The AAO notes that the exceptional and extremely unusual hardship standard in cancellation of removal cases is identical to the standard put forth by the Attorney General in *Matter of Jean*, *supra*, and codified at 8 C.F.R. § 212.7(d).

The BIA stated that in assessing exceptional and extremely unusual hardship, it would be useful to view the factors considered in determining extreme hardship. *Id.* at 63. In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established the lower standard of extreme hardship. 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

In *Monreal*, the BIA provided additional examples of the hardship factors it deemed relevant for establishing exceptional and extremely unusual hardship:

[T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme

hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-4.

In the precedent decision issued the following year, *Matter of Andazola-Rivas*, the BIA noted that, “the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face.” 23 I&N Dec. 319, 323 (BIA 2002). The issue presented in *Andazola-Rivas* was whether the Immigration Judge correctly applied the exceptional and extremely unusual hardship standard in a cancellation of removal case when he concluded that such hardship to the respondent’s minor children was demonstrated by evidence that they “would suffer hardship of an emotional, academic and financial nature,” and would “face complete upheaval in their lives and hardship that could conceivably ruin their lives.” *Id.* at 321 (internal quotations omitted). The BIA viewed the evidence of hardship in the respondent’s case and determined that the hardship presented by the respondent did not rise to the level of exceptional and extremely unusual. The BIA noted:

While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former “extreme hardship” standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher “exceptional and extremely unusual hardship” standard.

23 I&N Dec. at 324.

However, the BIA in *Matter of Gonzalez Recinas*, a precedent decision issued the same year as *Andazola-Rivas*, clarified that “the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.” 23 I&N Dec. 467, 470 (BIA 2002). The BIA found that the hardship factors presented by the respondent cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. The BIA noted that these factors included her heavy financial and familial burden, lack of support from her children’s father, her U.S. citizen children’s unfamiliarity with the Spanish language, lawful residence of her immediate family, and the concomitant lack of family in Mexico. 23 I&N Dec. at 472. The BIA stated, “We consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.” *Id.* at 470. An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate. See *Gonzalez Recinas*, 23 I&N Dec. at 469 (“While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship.”).

The record of hardship includes: an affidavit from the applicant’s spouse, an affidavit from the applicant, financial documentation, and medical documentation.

The record indicates that the applicant's spouse's hardship claims in regards to relocation are based on severe financial, emotional, and medical hardships. The record indicates and the field office director found that the applicant's spouse would suffer extreme hardship as a result of relocation due to the applicant's spouse's age, employment, medical conditions, inability to speak Russian, and her lack of any ties to Russia. However, the AAO does not find that relocation would result in exceptional or extremely unusual hardship to the applicant's spouse. The record indicates that the applicant's spouse is an attorney and a certified public accountant in California. In addition, the record indicates that the applicant is qualified as a mechanical engineer in Russia. Both the applicant and his spouse are highly educated and trained individuals. Although, the AAO acknowledges that the applicant's spouse's inability to speak Russian will make finding employment more difficult, her education and professional background and the background of the applicant make it so that relocation to Russia would not reach the level of exceptional and extremely unusual hardship. Furthermore, the AAO recognizes that the applicant's spouse is suffering from numerous chronic medical conditions that she has a record of being treated for in the United States for over ten years. Again, the AAO acknowledges that establishing new doctors and medical care for the applicant's spouse in Russia would be an extreme hardship, but would not reach the levels of exceptional or extremely unusual hardship. Nothing in the current record indicates that the applicant's spouse would not have access to the appropriate medical care upon her relocation to Russia.

Moreover, the record indicates that the applicant's spouse's hardship claims in regards to separation from the applicant are based on the applicant's spouse suffering separation anxiety, her medical conditions increasing in severity due to being separated from the applicant, and the financial burden of having her spouse living in Russia. As the AAO has found that relocation to Russia would not result in extremely unusual or exceptional hardship to the applicant's spouse, the AAO also finds that the current record does not indicate that separation would result in exceptional or extremely unusual hardship. The record indicates, through letters from the applicant's spouse's dentist and primary care physician that the applicant's spouse is suffering from arthritis, back spondyloses, hypertension, cholelithiasis, hormone imbalance, depression, and separation anxiety. The statements from counsel and the letter from the applicant's spouse's doctor indicate that the applicant's spouse's condition is so severe that she requires the applicant in the United States as her caretaker. However, the AAO notes that the record also indicates that the applicant's spouse continues to function as an attorney and certified public accountant making approximately \$100,000 per year which would mean that she is functioning on a daily basis at a professional level without the help of the applicant. The AAO also notes that the applicant's spouse's primary concerns regarding separation, i.e.: anxiety and financial hardship, can be avoided by relocation.

The AAO notes that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, the record does not show that the difficulties suffered by the applicant's spouse, considered in the aggregate, would rise to the level of exceptional and extremely unusual hardship. *Matter of Monreal-Aguinaga*, 23 I&N Dec. at 62. In sum, the applicant did not demonstrate that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d).

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.