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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: OCT 31 2011 Office: BALTIMORE FILE: [redacted]

IN RE: Applicant: [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,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Peru 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 been convicted of crimes involving moral turpitude. She seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen husband and lawful permanent resident parents.

The district director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the District Director*, dated May 20, 2009.

On appeal, counsel for the applicant asserts that the applicant was erroneously found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and that her family members will suffer extreme hardship should the applicant reside outside the United States. *Brief from Counsel*, dated July 21, 2009.

The record contains, but is not limited to: a brief from counsel; documentation that shows that the applicant was pregnant as of May 14, 2009; statements from the applicant's husband and brother-in-law; copies of medical records for the applicant's parents and brother-in-law; a psychological evaluation discussing the applicant's family members; correspondence between the applicant's husband and a licensed social worker; documentation on conditions in Peru; a death certificate for the applicant's mother-in-law; tax records for the applicant's husband; documentation of the applicant's family's health insurance; and documentation in connection with the applicant's criminal convictions. The entire record was reviewed and considered in rendering this decision.

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.)

In *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. First, 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).

However, 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." 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. 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.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record shows that the applicant pled guilty to embezzling U.S. currency under Code of Virginia § 18.2-111 for her conduct on May 26, 2003. At the time of the applicant's conviction, Code of Virginia § 18.2-111 stated:

> Embezzlement deemed larceny; indictment.
>
> If any person wrongfully and fraudulently use, dispose of, conceal or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other personal property, tangible or intangible, which he shall have received for another or for his employer, principal or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another or by any court, corporation or company, he shall be guilty of embezzlement. Embezzlement shall be deemed larceny and upon conviction thereof, the person shall be punished as provided in § 18.2-95 or § 18.2-96.

Upon review, there is ample support to show that convictions under Code of Virginia § 18.2-111 are categorically crimes involving moral turpitude. Crimes that require fraud as an element have been found to be crimes involving moral turpitude. *Matter of Adetiba*, 20 I&N Dec. 506, 507-08 (BIA 1992); *Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980). As all offenses under Code of Virginia § 18.2-111 require that an offender engaged in the proscribed conduct "wrongfully and fraudulently," they involve moral turpitude, giving rise to possible inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

The record further shows that the applicant pled guilty to a theft offense under Code of Virginia § 18.2-96 for her conduct on or about October 9, 1997. The charge was ordered dismissed on August 7, 1998.

On appeal, counsel asserts that the applicant's 1997 theft offense did not result in a conviction for immigration purposes. Counsel contends that the record of conviction contains no order from the judge punishing, penalizing, or restraining the applicant's liberty. Counsel notes that the applicant performed 50 hours of alternative community service prior to the judge ordering the dismissal of her charge on August 7, 1998, yet counsel contends that the applicant performed this community service voluntarily

and that the judge did not order it. Counsel asserts that the absence of a stated punishment in the judge's order supports that the judge did not order the community service or impose any other restraint on the applicant's liberty.

Section 101(a) of the Act provides, in pertinent part:

> As used in this Act-
>
> > (48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-
> >
> > > (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> > >
> > > (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.
> >
> > (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

The record contains a "Referral Form for Community Service Agencies" that references the applicant as "Defendant", states her larceny charge and docket number, indicates a "Referring Judge", and notes her next court date in criminal proceedings which corresponds to the date that her charge was dismissed. The form instructs the applicant that "you are to report immediately to the agency in person or by telephone for . . . 50 hours of program participation," and that "failure to contact the agency immediately may jeopardize your acceptance into the program." The form is signed by an individual with the title Deputy Clerk, and it notes that the original form is to be held by the criminal court. The record contains a letter, dated July 7, 1998, addressed to the Fairfax County General District Court that reports that the applicant successfully completed "the required hours of Alternative Community Service." The letter states the applicant's docket number and August 7, 1998 court date, and it notes that the applicant completed 50 required hours.

Upon review, these two documents support that the applicant completed 50 hours of community service as a condition of the dismissal of her theft charge. It is clear that the applicant was referred for community service by the judge in criminal proceedings, and it was not her voluntary decision as characterized by counsel. The referral letter from the court references the applicant's "acceptance into the program" which supports that she entered the community service program as an alternative to receiving a sentence in court. The letter informing the court of the applicant's completion of the program twice refers to her "required hours" of community service. Accordingly, the AAO finds that the record shows by a preponderance of the evidence that the judge did in fact impose a restraint on the applicant's

liberty in the form of required community service. Thus, the applicant's charge under Code of Virginia § 18.2-96 did result in a conviction as contemplated by section 101(a)(48)(A) of the Act.

At the time of the applicant's conviction, Code of Virginia § 18.2-96 stated:

> Petit larceny defined; how punished.
>
> 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.

The Code of Virginia does not define the elements of larceny, thus they are left to common law interpretations. 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."). However, in Matter of Jurado, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA 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. As the record of the applicant's conviction clearly shows that she engaged in an act of retail theft, the applicant's offense under Code of Virginia § 18.2-96 constitutes a crime involving moral turpitude.

As the applicant has been convicted of two crimes involving moral turpitude, she does not qualify for the "petty offense" exception in section 212(a)(2)(a)(ii) of the Act. Accordingly, the applicant requires a waiver under section 212(h) of the Act.

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

> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .
>
> (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.

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 husband and parents are the 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).

Applicant's husband expressed that he will face significant emotional difficulty should the applicant be forced to reside outside the United States. He stated that he has sought psychiatric help, he gained weight, he is not sleeping properly, and he has high levels of stress. The applicant's husband explained that his grandmother died suddenly and that he endured psychological hardship as a result. The applicant's husband stated that his brother, [redacted] has serious health problems, including juvenile diabetes from which he has suffered since the age of seven. The applicant's husband explained that approximately one week after his grandmother died, [redacted] suffered brain damage and was hospitalized for approximately six months due to a severe blood sugar drop, and he has had to learn to walk and eat on his own again. The applicant's husband indicated that [redacted] understands many commands but cannot speak. The applicant's husband provided that [redacted] resides in a nursing home in Maryland, and that he, his older brother, and his father share responsibility for [redacted], including taking turns picking him up on a daily basis, walking him, and putting him to bed every night. He noted that his father is aging and shares less of this responsibility.

The applicant's husband explained that his father suffers from high blood pressure and asthma, and he was hospitalized due to a mild stroke. He indicated that he has concern for his father's health.

The applicant's husband provided that the applicant has been his emotional support throughout his struggles for the last few years, including his grandmother's sudden death, his brother's illness, his

father's hospitalization, and the loss of his business. He noted that they have been married for approximately three years and they have not spent significant time apart.

The applicant's husband stated that the applicant's parents suffer from health problems, including high blood pressure and diabetes, and their doctors have advised them to avoid stressful situations. He asserted that the applicant's parents are unable to return to Peru due to their dependence on U.S. healthcare, and that the stress of separation from the applicant could be deadly for them. He stated that he does not wish to be separated from the applicant, but he would face significant hardship should he relocate to Peru due to the disruption of his ability to assist his parents and brother.

The applicant's brother-in-law, [redacted] further described the relationship between [redacted] and the applicant's husband's grandmother, including that they resided together and relied on each other for assistance and support. He noted that [redacted] suffered a serious emotional impact when the applicant's husband's grandmother died, and he experienced his diabetic coma approximately one week after her death. [redacted] added that the applicant's husband has experienced financial hardship in addition to his family crises, including the collapse of his business and inability to find work in his field. [redacted] stated that the applicant's support and therapeutic support sessions with [redacted] are the only things that help the applicant's husband preserve his emotional health.

The applicant submitted a report dated November 12, 2008 from a licensed social worker, [redacted] regarding her and her husband's history and difficulties. [redacted] noted that the applicant's husband's mother, youngest brother, and two sisters reside in Canada. [redacted] described the applicant's husband's participation in the care of his disabled brother including making weekly visits, meeting with doctors, attending planning sessions, taking him to the dentist, and exercising him. [redacted] explained that the applicant's husband lost his business in 2006 due to the actions of his partner, and he lost his income. [redacted] reiterated that the applicant's husband also lost his grandmother in July 2006, a week before his brother's severe brain damage. [redacted] posited that the applicant's possible removal has compounded her husband's emotional difficulty. [redacted] has diagnosed the applicant's husband with Dysthymia, a chronic form of depression, and he indicated that the applicant's husband requires continued therapy. [redacted] highlighted that the applicant's husband is faced with the difficult choice of relocating to Peru with the applicant or staying to care for his disabled brother.

[redacted] discussed other challenges the applicant's husband would face in Peru, including adapting to an unfamiliar culture and country, financial difficulty in a poor economy, and challenges due to his lack of Spanish language ability. [redacted] added that it is unlikely the applicant's husband could continue required therapy should he reside in Peru with the income of an unskilled, non-Spanish-speaking worker. [redacted] posited that, should the applicant be compelled to depart the United States, her husband would be deprived of a critical support system and he would more than likely become more dysfunctional.

Upon review, the applicant has shown that a qualifying relative, her husband, will suffer extreme hardship should the present waiver application be denied. The record establishes that the applicant's husband has endured significant emotional challenges with his family, including the death of his grandmother and his brother's disability. While the applicant's husband is not his brother's sole

primary caregiver, the applicant has established that he participates in his brother's care in a meaningful way in conjunction with another brother and his father. The applicant's husband's responsibility for his disabled brother, and the substantial emotional difficulty involved, constitute unusual circumstances not commonly experienced by individuals who face the possible removal of a spouse. It is evident that the applicant's husband would face significant psychological hardship should he relocate to Peru and lose the ability to directly participate in his brother's care. The record also shows that the applicant's husband derives emotional support and stability from his relationship with the applicant, and becoming separated from her in the face of his current stressors would greatly exacerbate his difficulty.

The AAO has carefully examined [redacted] evaluation of the applicant's husband. The report provides additional detail regarding the applicant's and her husband's history and challenges, and concludes that the applicant's husband suffers from chronic depression. Many of the observations of [redacted] are supported by other statements and evidence in the record. Correspondence in the record shows that [redacted] service was initiated in the course of these proceedings at the invitation of the applicant's counsel. While this fact suggests that the applicant did not independently seek mental health services, the AAO values the opinion of a mental health professional and gives appropriate weight to [redacted] report.

The applicant submitted information relating to her husband's employment and business activities including statements asserting that her husband lost his business. The record does not contain sufficient documentation in order for the AAO to fully assess the applicant's husband's financial circumstances, yet his concerns are noted in evaluating the totality of his challenges.

The applicant's husband would face other difficulties should he relocate to Peru, including separation from his country and culture of birth, separation from his father and two brothers, the challenge of adapting to a new country where he is not a native speaker, economic concerns, and the possible reduced access to mental health services. While many of these factors are commonly faced when an individual relocates to the inadmissibility of a spouse, all elements of hardship are considered in aggregate, and due consideration is given to these additional burdens.

Based on the foregoing, considering the applicant's husband's circumstances in total, the applicant has shown that her husband will suffer extreme hardship should she be compelled to reside outside the United States. Thus, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to a qualifying relative, as required for a waiver under section 212(h) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra,* at 12.

The negative factors in this case consist of the following:

The applicant has been convicted of two crimes involving moral turpitude. The applicant entered the United States on or about August 28, 1985 in B nonimmigrant status, and she has remained for a lengthy period without a legal immigration status.

The positive factors in this case include:

The applicant's husband will suffer extreme hardship should the applicant reside outside the United States. The applicant's parents, father-in-law, and brothers-in-law will face hardship should she depart the United States. The applicant has resided in the United States since 1985, and she will face significant difficulty should she return to Peru. The applicant has provided support for her U.S. citizen husband during difficult emotional times.

The applicant has been convicted of two theft-related offenses, the first for her conduct on or about October 9, 1997 and the most recent for her conduct on May 26, 2003. As these offenses were separated by a period of approximately six years, they do not represent an isolated incident or period of time. Thus, they call into question the applicant's integrity and respect for U.S. law. However, the record does not show that the applicant has engaged in criminal conduct in the preceding eight years. Nor does the record show that the applicant has a propensity to engage in further criminal acts. Accordingly, the AAO finds that the positive factors in this case overcome the negative factors, and the applicant warrants a favorable exercise of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden that she merits approval of her application.

ORDER: The appeal is sustained.