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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

[redacted]

H2

Date: FEB 14 2012 Office: CALIFORNIA SERVICE CENTER 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.

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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Cuba 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 a crime involving moral turpitude. She seeks a waiver of inadmissibility in order to reside in the United States with her lawful permanent resident husband.

The 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 Director,* dated July 24, 2009.

On appeal, counsel for the applicant asserts that the applicant's husband will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated August 20, 2009.

The record contains, but is not limited to: a brief from counsel; a statement from the applicant's husband; medical records for the applicant's husband; reports on conditions in Cuba; and documentation in connection with the applicant's criminal conviction. 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.)

The present case falls within the jurisdiction of the Eleventh Circuit Court of Appeals. In evaluating whether an offense constitutes a crime involving moral turpitude, the Eleventh Circuit employs the categorical and modified categorical approach. *Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1305-06 (11th Cir. 2011). "To determine whether a conviction for a particular crime constitutes a conviction of a crime involving moral turpitude, both [the Eleventh Circuit] and the BIA have historically looked to 'the inherent nature of the offense, as defined in the relevant statute . . . .'" *Id.* at 1305. "If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then the record of conviction—i.e., the charging document, plea, verdict, and sentence—may also be considered." *Id.* (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354–55 (11th Cir.2005)).

The Eleventh Circuit has rejected the methodology adopted by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). *Fajardo*, 659 F.3d at 1308-11. While the Attorney General determined that assessing whether a crime involves moral turpitude may include looking beyond the record of conviction, the Eleventh Circuit has stated that "[w]hether a crime involves the depravity or fraud necessary to be one of moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." *Itani v. Ashcroft,* 298 F.3d 1213, 1215–16 (11th Cir. 2002). In *Fajardo,* the Eleventh Circuit affirmed its reasoning in *Vuksanovic v. U.S. Attorney General,* 439 F.3d 1308, 1311 (11th Cir.2006), stating that "the determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicating a particular conviction." 659 F.3d at 1308-09.

The record shows that the applicant was convicted of grand theft under Florida Statutes § 812.014(2)(c)(1) for her conduct on or about September 16, 2003. The Board of Immigration Appeals

(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."). In *Matter of Jurado*, 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. Florida Statutes § 812.014(2)(c)(1) is divisible, as it prescribes both temporary and permanent takings of property. However, the charging document in the applicant's case reflects that her act of theft involved retail theft. Thus, there is ample support that she committed theft with the intent to permanently deprive the owner of the property, and her act constitutes a crime involving moral turpitude. The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. She concedes her inadmissibility on appeal. 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 is the qualifying relative 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 a brief dated August 20, 2009, counsel asserts that the applicant's husband will suffer extreme hardship should the present waiver application be denied. Counsel states that the applicant entered the United States on January 25, 2002, and her husband became a lawful permanent resident and they were married in February 2007. Counsel asserts that the applicant's husband would be unable to maintain their household on his own, in part due to the fact that he must provide economic support for his two children. Counsel asserts that the applicant's husband has relied on the applicant's emotional support since his divorce from his prior wife. Counsel contends that the applicant would be unlikely to earn sufficient income in Cuba to assist her husband in the United States. Counsel asserts that the applicant's husband would be unable to visit the applicant in Cuba and their communication would be limited due to a lack of economic resources. Counsel states that the applicant's husband would be unable to relocate to Cuba, as his entire life is in the United States including his two small children. Counsel indicates that the applicant's husband would not subject his children to the oppressive political circumstances in Cuba. Counsel notes poor conditions in Cuba, including reduced standards of medical care. Counsel states that the applicant's husband has endured a medical condition which caused some discomfort, yet it is under control with his care in the United States.

In a statement dated April 14, 2008, the applicant's husband provided that he has suffered depression in the past, and he fears losing the emotional support of the applicant. He asserts that he has been hospitalized twice, for high blood pressure and a stress-induced attack, and his condition has been maintained with the applicant's assistance. He stated that the applicant is helpful with his two children from a prior relationship, and that they may endure difficulty should she depart the United States.

Upon review, the applicant has not shown that her husband will suffer extreme hardship should the present waiver application be denied. The AAO has carefully considered the information regarding the applicant's husband's health. The applicant submits a brief medical record for her husband, dated March 30, 2005, regarding a post-operation visit in which his symptoms of an infection had resolved and no persisting complications were noted. However, this document is not sufficient to support the claims that he has suffered hospitalization for high blood pressure or a stress-related attack. The record does not show that he presently suffers from physical health problems that require significant medical care. The applicant has not shown that her husband requires health services that are unavailable in Cuba, or that he would lack medical care should he remain in the United States without her.

The AAO acknowledges that the separation of spouses often results in significant psychological suffering, and that the applicant's husband will endure emotional hardship should he remain in the United States without the applicant. However, the information and evidence in the record does not

distinguish his emotional challenges from the common difficulty experience when spouses reside apart due to inadmissibility.

The applicant's husband asserts that he will face financial difficulty should he remain in the United States or relocate to Cuba. However, the applicant has not presented any evidence of her husband's expenses or income. While he claims that he has two children from a prior marriage for whom he has economic responsibilities, the applicant has not presented birth certificates or other evidence to show that her husband has children. Nor has the applicant provided documentation that reflects his responsibility for any children, such as a custody or child support order, financial records or statements from individuals with direct knowledge of these children and their relationship to the applicant's husband.

The AAO has examined the reports on conditions in Cuba provided by the applicant, and acknowledges that the country continues to present economic and political challenges. However, the applicant has not shown that all individuals residing in Cuba face difficulty that rises to an extreme level. Nor has the applicant provided sufficient explanation to show how her husband would be personally impacted by conditions in Cuba should he reside there. The record indicates that the applicant's husband is a Cuban national and that he became a lawful permanent resident in 2007. Thus, it is presumed that he would not face the challenges of adapting to an unfamiliar language or culture should he return there. The AAO is unable to conclude that conditions in Cuba mandate a finding of extreme hardship for the applicant's husband should he relocate to the country.

Considering all elements of hardship in aggregate, the applicant has not provided sufficient evidence to show that her husband will suffer extreme hardship should he remain in the United States without her or relocate to Cuba to maintain family unity. Accordingly, the applicant has not shown that denial of his waiver application under section 212(h) of the Act "would result in extreme hardship" to her husband. Accordingly, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings regarding a waiver of grounds of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* 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.