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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

H2

[redacted]

Date: JAN 25 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

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 Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Colombia 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 remain in the United States with her U.S. citizen son and daughter.

In a decision, dated April 8, 2009, the director found that the applicant failed to establish that her qualifying relatives would suffer extreme hardship as a result of her inadmissibility. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated May 6, 2009, counsel states that the director failed to consider all relevant factors regarding hardship both individually and cumulatively. Counsel states further that if relief is available, the director should look more favorably upon the cumulative facts than if not.

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.

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 December 19, 1998 the applicant was arrested and charged with petit larceny and on February 16, 1999 she was convicted of this charge. In addition, on January 13, 1998, in Miami-Dade County, Florida, the applicant was arrested and charged with one count of Grand Theft in the third degree under Florida Statutes § 812.014. On February 3, 1998 she was convicted of

this charge. The AAO notes that third degree felonies in Florida are punishable for up to 5 years in prison.

The AAO notes that the applicant's case arises under the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. *See Fajardo v. Attorney General,* 659 F.3d 1301, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). In its decision, the Eleventh Circuit defined the categorical approach as " 'looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.' " 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernauth v. U.S. Att'y Gen.,* 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The AAO now turns to a consideration of whether the applicant's convictions constitute crimes involving moral turpitude under the categorical approach mandated by the Eleventh Circuit Court of Appeals, restricting any modified categorical inquiry to the applicant's record of conviction.

At the time of the applicant's conviction, Fl. Stat. § 812.014 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 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. The complaint in connection with the applicant's January 13, 1998 arrest indicates that the applicant and her co-defendant were caught stealing merchandise from a retail store. 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. Therefore, the AAO finds that the applicant was convicted under the part of the statute pertaining to permanent takings, and has thus been convicted of at least one crime involving moral turpitude: grand theft under Fl. Stat. § 812.014.

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 son and daughter 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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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.*, *Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record of hardship includes: counsel's brief; medical records for the applicant's son; and affidavits from the applicant, the applicant's daughter, and the applicant's son.

Counsel's brief indicates that the applicant came to the United States in 1992 from Colombia where she worked in the legal field, but that she has not worked in this field since 1992, she is now 51 years old, and has no employment skills. In addition, counsel states that the applicant's son's father abandoned the family before her son was born, that her son does not speak or write fluently in Spanish, and he would be forced to adopt a foreign culture, language, and lifestyle if he relocated to Colombia. Medical documentation in the record indicates that the applicant's sixteen year old son has a heart condition that requires follow-up care at least twice a year and that he has had an

operation because of this condition to implant a device made for closing an abnormal opening in the wall between the two upper chambers of the heart.

In addition, the applicant's daughter states, in an affidavit dated July 26, 2007, that she and her brother never lived with their father and that their mother is their whole world. She states that she and her husband are currently trying to have a baby, that they would like the applicant to be the caregiver for the baby, and that the applicant will be the baby's only grandmother. In his statement, the applicant's son states that he does not want to relocate to Colombia because then he would have to become familiar with Colombian culture, he cannot write correctly in Spanish, and he cannot read in Spanish as well as he can read in English.

The AAO finds that the current record indicates that the applicant's son would experience extreme hardship as a result of relocating to Colombia. The applicant's son, who is now sixteen years old and suffers from a heart condition, would suffer from being taken out of school, separated from his sister in the United States, separated from the only life he has known and separated from the only other immediate family member he has a close relationship with. U.S. courts have held that "imposing on *grade school age citizen children, who have lived their entire lives in the United States,* the alternatives of either . . . separation... or removal to a country of a vastly different culture" must be considered in a determination of whether extreme hardship has been shown, *Ramos v. INS,* 695 F.2d 181, 186 (5th Cir. 1983) (emphasis added), noting that "there is, of course, a great difference between the adjustment required of . . . infants and that of grade school age children." *Id.* at 187, fn 16; *see also Matter of Kao & Lin,* 23 I & N Dec. 45 (BIA 2001) (finding extreme hardship for a 15 year old, who had lived her entire life in the United States and was completely integrated into her American lifestyle, if she were uprooted upon her parent's deportation). The applicant's son, who is sixteen years old, receives ongoing treatment for a heart condition, has lived his entire life in the United States, and aside from his mother, has no other close familial ties to Colombia, would experience extreme hardship as a result of relocating to Colombia. In addition, the applicant's son would experience extreme hardship as a result of being separated from his mother and only parent. The applicant is the only caretaker for her son, whose father abandoned the family before he was born. In addition, the applicant's daughter also resides in the United States. As noted above, considerable, if not predominant, weight must be given to the hardship that will result from the separation of family members. *See Salcido-Salcido, supra; see also Bastidas v. INS,* 609 F.2d 101 (3rd Cir.1979), (the court explicitly stressed the importance to be given the factor of separation of parent and child). Thus, given the applicant's family ties to the United States, in particular the applicant's relationship with her son and the absence of the father in her children's lives, the AAO finds that separation of the children from their mother would cause extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 factors in the present case are the applicant's convictions for theft. The favorable factors in the present case are the applicant's family ties to the United States; hardship to her family if she were to be denied a waiver of inadmissibility; the applicant's lack of a criminal conviction since 1998; and, as indicated by statements from the applicant, her children, and her son-in-law, the applicant's regrets over her actions in the past, as well as her attributes as a loving and supportive mother.

The AAO finds that the crimes committed by the applicant are 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.