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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

PUBLIC COPY

[redacted]

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DATE: JAN 26 2012 Office: PHILADELPHIA, PA 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,

for

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Guatemala 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. The applicant's spouse is a U.S. citizen. She seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Field Office Director's Decision*, dated August 7, 2009.

On appeal, counsel details the hardship that the applicant's spouse would encounter if the applicant was in Guatemala. *Form I-290*, received September 8, 2009.

The record includes, but is not limited to, the Form I-290B, the applicant's spouse's statement, financial records and medical records. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

> (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 record reflects that the applicant was convicted on November 19, 2008 of retail theft, second degree misdemeanor, under Title 18, § 3929(a)(1) of the Pennsylvania Consolidated Statutes and she received 12 months of probation and various monetary penalties.

Title 18, § 3929(a)(1) of the Pennsylvania Consolidated Statutes states:

(a) Offense defined.--A person is guilty of a retail theft if he:

> (1) takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof;

The Board of Immigration Appeals (BIA) has found that retail theft in violation of Title 18, § 3929(a)(1) of the Pennsylvania Consolidated Statutes is a crime involving moral turpitude. *In re Jurado-Delgado*, 24 I&N Dec. 29 (BIA 2006). As such, the AAO finds that the applicant committed crimes involving moral turpitude and she is therefore inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

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

> (h) 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 . . .

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 spouse is the only 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 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.

Counsel states that the applicant's spouse is covered under private workers' compensation insurance; he is not receiving public or government medical assistance for his medical conditions; he would not be covered by his private workers' compensation insurance in Guatemala; he does not receive a weekly disability check, rather he received one lump sum in October 2006; he may need to reopen his workers' compensation case if his medical conditions worsen; he must be present in the United States to reopen his case; and he would not be able to litigate or be further compensated in Guatemala. *Form I-290B.*

The applicant's spouse states that he is not fluent in Spanish and he would not receive the same medical attention as he would in the United States. *Applicant's Spouse's Second Statement*, dated September 3. 2009.

The record includes prescription notes from 2009 for the applicant's spouse for an anti-depressant, a corticosteroid and pain relievers. The records reflects that he was diagnosed with depression by [redacted] on September 3, 2009. The record includes medical records from May 11, 2008 reflecting that the applicant's spouse has moderate degenerative disc disease at L5-S1 with an associated disc bulge and central disc herniation; and minimal broad-based disc bulge at L4-L5. The medical records prior to this date reflect a lengthy history of back pain. The record includes an October 26, 2006 award of compensation for the applicant's spouse from the Workers' Compensation Commission in Baltimore, Maryland. The award is for a period of 75 weeks. The award indicates 22.5% disability based on low back and psychiatric.

The record reflects that the applicant's spouse does not speak Spanish. There is no indication that he has any ties to Guatemala. It further reflects that he has serious back issues and depression, and that he has been receiving medical care in the United States. Based on these issues, and the normal results of relocation, the AAO finds that he would experience extreme hardship if he relocated to Guatemala.

The applicant's spouse states that he works as a delivery router; he drives the car and the applicant does the heavy lifting; he has had depression, anxiety, lower back pain, suicidal feelings, etc; and he could not survive in his job without the applicant. *Applicant's Spouse's Second Statement.* The applicant's spouse states that he loves the applicant more than anything on the earth; he would not be able to live without her; he used be alone and suffer from back problems on his own; the applicant supports him and gives him the strength to continue working; he used to drink a lot and not take care of himself; and she gives him something to live for. *Applicant's Spouse's First Statement*, dated July 27, 2009. The applicant's spouse's mother states that the applicant's spouse was an alcoholic with a DUI background; he stopped drinking and his attitude changed upon dating the applicant; the applicant supported him when he could not work; the applicant married him although he could hardly work; he is currently suffering from injuries and cannot work a full-time job; he works part-time delivering newspapers and needs the applicant to help him with the deliveries; and she does not know if he would be alive today but for the applicant's influence and care. *Applicant's Spouse's Mother's Statement*, dated July 27, 2009. The record includes expenses for the applicant's spouse including rent, mobile home payments and insurance. The record includes a patient health questionnaire in which the applicant's spouses discloses that nearly every day he has sleep issues,

eating issues, trouble concentrating and thoughts that he would be better off dead or of hurting himself.

The record does not include sufficient documentary evidence to support the claim that the applicant's spouse is dependent on the applicant to maintain his employment. However, the record reflects that the applicant's spouse has numerous medical issues and the applicant has played a role in turning his life around. The record also reflects that he is experiencing significant emotional issues. Based on these factors, and the normal results of separation from a spouse, the AAO finds that he would experience extreme hardship if he remained in the United States.

In *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

> 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).

Id. at 301.

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 criminal conviction and unauthorized period of stay.

The favorable factors include the U.S. citizen spouse and extreme hardship to the applicant's spouse.

The AAO finds that the crime and immigration violation committed by the applicant are serious in nature; nevertheless, when taken together, we find 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained. The waiver application will be approved.