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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 09 2013 Office: DENVER, CO 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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, child and stepfather are U.S. citizens and his mother is a lawful permanent resident. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The field office director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated June 29, 2011.

On appeal, counsel details the hardship to the applicant's qualifying relatives. *Form I-290B Attachment*, received July 29, 2011.

The record includes, but is not limited to, counsel's brief, statements from the applicant's family members, financial records, educational records, country conditions information and criminal records. The entire record was reviewed and considered in rendering a decision on the appeal.

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....
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> 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 reflects that on February 23, 2004, the applicant was convicted of theft in the third degree in violation of [redacted]. The applicant received two years of supervised deferred judgment and 48 hours of public service. As the applicant has not contested his inadmissibility on appeal, and the record does not show that determination to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

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 –
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> . . . .

> (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, child 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 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

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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 Native American spouse only has family in the United States and has never lived in Mexico; she does not speak, read or write Spanish and is unfamiliar with the culture; the applicant suffers from significant medical impairments including hearing loss and leg deformity which limits his employment opportunities; his spouse is attending school; they depend heavily on his family; the applicant is a native of Monterrey, Nuevo Leon; their daughter will suffer academically due to her lack of Spanish fluency and ties to Mexico; the applicant's spouse would be unable to continue a higher education in Mexico; and she does not share the same culture, beliefs or religious preference and would be ostracized by the Mexican community. Counsel cites to a U.S. Department of State Travel Warning for Mexico which details safety issues in Monterrey and Nuevo Leon. The applicant's medical records reflect serious hip and leg issues.

The applicant's spouse states: she was born and raised in the United States; she has no family in Mexico; all of her family lives in the United States and they are very important to her; her mother has medical issues and she does not wish to be away from her; she would not risk her and her daughter's safety by going to Mexico; they do not own a car and would have to travel by taxi, which is extremely dangerous; she is going to apply to college and her education would no longer be an option; and her family will get medical care in the United States.

The AAO notes the November 20, 2012 Department of State Travel Warning for Mexico which details general safety issues and specifically mentions safety issues in Monterrey and Nuevo Leon. It states, in pertinent part:

> Nuevo Leon: Monterrey is a major city/travel destination in Nuevo Leon -see map to identify its exact location: You should defer non-essential travel to the state of Nuevo Leon, except the metropolitan area of Monterrey where you should exercise caution. The level of violence and insecurity in Monterrey remained high. Sporadic gun battles and attacks on casinos and adult entertainment establishments continue, as do placements of "narco banners" on bridges. TCOs have kidnapped and in some cases murdered American citizens, even when ransom demands are met. TCOs continue to attack local government facilities, prisons and police stations, and engaged in public shootouts with the military and between themselves. TCOs have used vehicle-borne improvised explosive devices against military and law enforcement units as well as incendiary devices against several types of businesses. Pedestrians and innocent bystanders have been killed in these incidents. Local police and private patrols have limited capacity to deter criminal elements or respond effectively to security incidents. As a result of a Department of State assessment of the overall security situation, the Consulate General in Monterrey is a partially unaccompanied post with no minor dependents of USG personnel permitted. USG personnel serving at the U.S. Consulate General in Monterrey may not frequent casinos, sportsbooks, or other gambling establishments and may not travel outside the San Pedro Garza Garcia municipal boundaries between midnight and 6 a.m.

The record reflects that the applicant's spouse's family is in the United States and she has no ties to Mexico. She does not speak Spanish and is Native American. She would be losing educational opportunities in Mexico. The AAO notes that she has a young child and her concerns for her family's safety are supported by the record. The AAO also notes the applicant's medical issues and concerns that he would be unable to obtain employment in Mexico. Considering the hardship factors mentioned, and the normal results of relocation, the AAO finds that the applicant's spouse would suffer extreme hardship if she resided in Mexico.

Counsel states that: the applicant would not be able to survive in Mexico alone and he would not know his way around; the applicant's spouse is unemployed and relies on the applicant for financial and family support; the applicant's daughter relies on him for family support; the applicant's spouse would likely be displaced from her in-laws' home as she would have nobody to support her and their daughter; she may have to resort to state housing and welfare; their marriage would suffer dramatically; and the applicant's family would suffer anguish as they would constantly worry about the applicant's safety in Mexico based on the country conditions and the drug war.

The applicant's spouse states that she has been with the applicant for six years; she counts on him for everything; she and their daughter need his support; and it will be hard to keep up their marriage with the applicant gone.

The applicant's and his spouse's bank account had a negative balance as of May 18, 2011. The record reflects that the applicant's spouse had an outstanding school balance of $2,746.60. The applicant's father states that he employs the applicant.

The record reflects that the applicant's spouse would be raising their young child without the applicant. She has serious concerns about the applicant residing alone in Mexico due to safety and other issues, and these concerns are supported by the record. In addition, the applicant's spouse would benefit from the applicant's financial assistance. Her concerns for the future of her marriage are also noted. Considering the hardship factors mentioned, and the normal results of separation, the AAO finds that the applicant's spouse would suffer extreme hardship if she remained in the United States.

As the AAO has found extreme hardship to the applicant's spouse, we will not address hardship to his other qualifying relatives.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien 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 "balance 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 crime, unauthorized period of stay and unauthorized employment.

The favorable factors include the presence of the applicant's U.S. citizen and lawful permanent resident spouse, parents and child; and extreme hardship to his spouse.

The AAO finds that the criminal and immigration violations committed by the applicant 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 and the application will be approved.

ORDER: The appeal is sustained. The application is approved.