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

DATE: OCT 24 2013 Office: MIAMI, FL FILE:

IN RE: Applicant:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Miami, Florida. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application remains denied.

The record reflects that 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 committed crimes involving moral turpitude. The applicant's spouse and four children are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The Field Office Director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated December 6, 2011. The AAO summarily dismissed the appeal, as the applicant failed to identify specifically any erroneous conclusion of law or statement of fact. *AAO Decision*, dated July 8, 2013. On motion, counsel asserts that due to a clerical error the brief in support of appeal was inadvertently sent to the Miami Field Office. *Counsel's Affidavit*, dated August 9, 2013.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

Counsel has submitted his affidavit and the previously submitted brief, which establish that the requirements of a motion to reopen have been met.

The record includes, but is not limited to, counsel's brief, financial records, country conditions information on Cuba, and the applicant's criminal 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 parts:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> (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 (Board) 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 v. U.S. Atty. Gen.*, 659 F.3d 1303, 1308-11 (11th Cir. 2011). 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 v. U.S. Atty. Gen.,* 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." *Fajardo v. U.S. Atty. Gen.*, 659 F.3d at 1308-09.

The record reflects that on April 2, 1973, the applicant was convicted of robbery under former Florida Statutes § 813.011 and he was sentenced to five years of probation; on April 19, 1994, he was convicted of prostitution under Florida Statutes § 796.07 and he was sentenced to one month of probation; and on July 14, 2003, he was convicted of petit theft under Florida Statutes § 812.014 and he was given credit for time served. 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 for these crimes under section 212(a)(2)(A) of the Act.[1]

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[1] The record reflects that the applicant was convicted of battery on November 17, 1992, reckless driving on June 20, 1997, and driving with an expired driver's license on July 31, 1997. The AAO will not address whether these crimes involve moral turpitude as the applicant's convictions for robbery, prostitution and theft have already resulted in inadmissibility under section 212(a)(2)(A) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. Section 212(h) of the Act provides, in pertinent part, that:

> The Attorney General [now Secretary of the Department of Homeland Security, "Secretary"] 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 . . . .
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that –
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> (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,
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> (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
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> (iii) the alien has been rehabilitated; or
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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 [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
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> (2) the [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 section 212(h)(1)(B) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, in this case the applicant's spouse and children. The record reflects that the applicant's children range in age from 27 to 38. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (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 asserts that the Field Office Director erred in stating that there are no deportations to Cuba and the applicant will not suffer physical separation from his family. The Field Office Director has not established that there are no deportations to Cuba currently. In addition, extreme hardship analysis is prospective in nature. The analysis involves what would happen in the future event of relocation to Cuba, or if a qualifying relative would remain in the United States.

Counsel states that the applicant's spouse is under the care of a physician for diabetes mellitus type 2, hypertension and hyperlipidemia; the applicant's spouse fears she may not have access to quality medical care in Cuba; and the applicant's spouse is extremely anxious and afraid for her life due to her medical conditions.

Counsel also states that the applicant's spouse has no family connections in Cuba; she fears violence associated with demonstrations against the Cuban government; the applicant's family believes their lives will be in harm's way; the applicant and his qualifying relatives have little or no chance of finding work due to high unemployment and restrictions in Cuba; the applicant's spouse will not be able to purchase her medication; the applicant and his spouse's income potential is limited by their education; and the applicant's spouse is advanced in age and the Cuban government would not render any assistance.

The applicant's spouse states that her children were born and raised in the Unites States; they do not know any place other than the United States; she and the applicant love their grandchildren; she and the applicant have other U.S. citizen and lawful permanent resident family members; and she is afraid of the security and political situation in Cuba and may not be able to find work.

According to the applicant's spouse's physicians, she is a non-insulin dependent diabetic patient; she has diabetes mellitus type 2, hypertension and hyperlipidemia; and her conditions are chronic and could cause devastating consequences to her health if uncontrolled.

The record also includes articles on country conditions on Cuba that detail human-rights issues, the deportation of a Cuban from the United States to Cuba, and treatment of Cubans who return to Cuba after an illegal exit.

Although the applicant has shown that his spouse has medical issues, the severity of her conditions is not clear from the record nor is the availability of suitable medical care in Cuba. The record reflects that the applicant's spouse and children may experience some hardship in Cuba due to their residence in the United States and country conditions in Cuba. However, the record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that a qualifying relative would experience extreme hardship upon relocation to Cuba.

In asserting that the applicant's spouse would experience extreme hardship if she were to remain in the United States without the applicant, counsel states that the applicant's spouse needs the applicant's presence and support because of her medical issues; they rely on each other for everything; the applicant's four children have strong ties with him; the applicant's grandchildren would lose their emotional ties to the applicant; the applicant's qualifying relatives depend on him for financial support and his family cannot handle their expenses without this support; the

applicant's children are struggling financially and may not be able to assist the applicant's spouse; the applicant's family fears that they will have to support the applicant, as he will be treated as a second-class citizen in Cuba; the applicant's spouse is in her sixties and has been with the applicant for almost 30 years; the applicant does odd jobs and receives social security; and the applicant and his spouse's medical conditions make them unable to work long hours.

The applicant's spouse's 2009 tax return reflects wages of $4,832 and other evidence shows the family's adjusted gross income was $9,839 in 2008. The record includes no evidence of the applicant's individual financial earnings and obligations.

The applicant's spouse states that the applicant's presence and support is crucial as she undergoes treatment for her chronic medical condition; and she feels herself slipping out of control and losing herself to hypertension, anxiety and depression.

The applicant's son Alexis states that he has gone through a lot with the applicant; he cannot see himself without the applicant; and the applicant is always there when he needs him. The applicant's son Jorge states that the applicant has been his mentor and guide throughout his life; and he will experience great difficulty if the applicant is deported to Cuba.

Although the record reflects that the applicant's spouse and adult children may experience emotional hardship without him, it does not show that the applicant's spouse has been diagnosed with anxiety or depression or include evidence of his role in assisting his spouse with her medical conditions. The record also is not clear as to the severity of the applicant's spouse's medical conditions. Additionally, the record does not include sufficient documentary evidence to establish financial hardship to a qualifying relative. The record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that a qualifying relative would experience extreme hardship upon remaining in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to a qualifying relative caused by the applicant's inadmissibility to the United States. [2] Therefore, the

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[2] The AAO also notes that the applicant has been convicted of a violent crime (robbery) pursuant to 8 C.F.R. § 212.7(d). As such, he would need to establish that he is entitled to a favorable exercise of discretion under section 212(h)(2) of the Act.

The regulation at 8 C.F.R. § 212.7(d) provides:

> The [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

AAO finds that no purpose would be served in discussing whether he merits a waiver as a matter of overall discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is granted and the underlying application remains denied.