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: APR 2 9 2014 Office: OAKLAND PARK, FL FILE:

IN RE: Applicant:

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:

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Oakland Park, Florida. 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 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 a crime involving moral turpitude. The applicant's spouse and two 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), to remain in the United States with his wife and son.

The Field Office Director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated May 29, 2013.

On appeal, counsel asserts that the Field Office Director did not consider all of the hardship factors presented. *Form I-290B, Notice of Appeal or Motion,* filed June 27, 2013.

The record includes, but is not limited to, counsel's briefs; statements by the applicant, his spouse, and children; the applicant's criminal records; financial documents; education-related documents for the applicant's son, psychological records for the applicant's son and country-conditions information about Colombia. 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 –
>
> (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 applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals. For cases arising in the Eleventh Circuit, the determination of whether a conviction is for a crime involving moral turpitude begins with a categorical inquiry that "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); *see also Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *Sosa-Martinez v. U.S. Att'y Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2004). However, where the statute under which an alien was convicted is "'divisible'—that is, it contains some offenses that are [crimes involving moral turpitude] and others that are not[,] . . . the fact of conviction and the statutory language alone are insufficient to establish . . . under which subpart [the alien] was convicted." *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005). Under such circumstances, "the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) (citing *Jaggernauth*, *supra*, at 1354-55). The Eleventh Circuit does not permit inquiry beyond the record of conviction. *See Fajardo*, *supra*, at 1310 (11th Cir. 2011) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

The record reflects that the applicant was convicted on May 13, 2003 of petit theft in violation of Florida Statutes (Fl. Stat.) § 812.014 and on September 22, 2004 of grand theft in violation of Fl. Stat. § 812.014(2)(a)(2). He was sentenced to three days in jail and monetary penalties, and one year of community control and three years of probation, respectively, for his convictions.

Section 812.014 of the Florida Statutes states, in pertinent part:

> (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.

In the instant case, the statute under which the applicant was convicted, Fl. Stat. § 812.014, is divisible, because it addresses 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 and review the record of conviction to determine under which part of the statute the applicant was convicted. The submitted record of conviction includes the Information and Judgment.

The information document in the applicant's case reflects that the object of his theft was money. The BIA found in *Matter of Grazley* that theft of money reflects a permanent intent to deprive. *Id.* at 333. Thus, there is ample support that he committed theft with the intent to permanently deprive the owner of the property, and his act constitutes a crime involving moral turpitude. The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. He does not contest his 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:

> The Attorney General [now Secretary of Homeland Security, "Secretary"] 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 [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 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. 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.

The AAO will first address evidence relating to hardship the applicant's qualifying relative[1] would experience upon relocation to Colombia. The applicant's son states that he was born in Florida; he has lived in the United States his entire life; Colombia is a dangerous country where kidnappings and drug cartels exist; his family would be in danger there because criminals would assume they are wealthy, coming from the United States; English is his primary language; he has known his friends since preschool and elementary school; he is on the school football team; his mother works to support their family; and she would have to search for work in Colombia. The applicant's spouse states that their son has always lived in the same area; he loves the United States; and he does not speak fluent Spanish.

Counsel states that the applicant and his spouse are concerned about their son's education and future. Counsel submits an article from the University of Pennsylvania's Wharton school website about the role of the private sector in education in Colombia, which states that "high-quality education" provided by private non-profit schools is available only to upper-income families. In addition, the record includes school records corroborating counsel's claims that the applicant's son is enrolled in a program for gifted students and has been on the honor roll many times, as well as recruitment letters from several colleges addressed to the applicant's son.

Counsel also refers to U.S. Department of State information about Colombia that discusses to internal armed conflict, criminal gangs, terrorist groups and kidnappings. The applicant submits the U.S. Department of State's 2011 and 2012 Human Rights Reports about Colombia, which describe organized criminal gangs there. Moreover, the Department of State issued an updated travel warning on April 14, 2014, that includes information on armed criminal gangs, terrorist groups and kidnappings in Colombia.

The record reflects that the applicant's 17 year-old son has lived his entire life in the United States, does not speak fluent Spanish and is integrated into the American lifestyle. The BIA found that a 15 year-old child who lived her entire life in the United States, was completely integrated into the American lifestyle, and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The record also reflects that the applicant's son is an exceptional student, and his ability to pursue higher education in the United States likely would be adversely affected if he relocated to Colombia. Additionally, the record includes information about conditions would contribute to the applicant's son's hardship, specifically the safety issues related to criminal gangs, terrorist groups and kidnappings in Colombia. Considering the hardship factors presented and the normal results of relocation in their cumulative effect, the AAO finds that the applicant's son would experience extreme hardship upon relocation to Colombia.

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[1] The applicant submits evidence of hardship to both his spouse and his son; however, because the evidence supports a finding of extreme hardship to his son, the issue of extreme hardship to his spouse will not be discussed in this decision.

The AAO will now address hardship to the applicant's son upon remaining in the United States. The applicant's son states that he is worried about the applicant being removed to Colombia; he has lived with his parents his entire life; the longest he has been away from the applicant is four days; without the applicant in the United States, he would not be able to focus in school, would constantly be thinking about him, and his grades would suffer as a result; the applicant jokes and watches sports with him; and family unity is the most important thing in his life.

The applicant's son's psychotherapist notes that he is depressed and anxious and has poor coping skills, and she diagnoses him with an adjustment disorder. The record includes a Wikipedia article discussing adjustment disorders. The diagnostic evaluation reflects that the applicant's son's appointment was made because of the possibility that the applicant could be removed to Colombia.

The applicant's spouse states that it will be financially impossible for her to take their son to visit the applicant on a regular basis; their son is very sensitive; and they are a close-knit family. To address the family's financial hardship, the applicant and his spouse submit tax returns. Their 2011 return reflects an income of $28,133. The record includes a letter from the applicant's spouse's employer that states her salary is $950 twice monthly plus bonuses; it also includes paystubs for the applicant's spouse. The 2010 tax returns include a statement indicating that the applicant provided child care for their son when he was unemployed. Additionally, a notarized financial affidavit dated May 31, 2012, signed by the applicant's spouse, shows her monthly income exceeds the family's monthly expenses.

The record reflects that the applicant's son would be separated from the applicant, with whom he has a very close relationship, and as a result would experience emotional and psychological hardship. The applicant's son is an excellent student and considering the extent of his potential emotional and psychological hardship, his claim that his grades would be negatively affected has merit. Information about the applicant's spouse's income supports her claim that their son could not visit the applicant regularly. Considering the hardship factors presented and the normal results of separation, the AAO finds that the applicant's son would experience extreme hardship upon remaining in the United States.

Considered in the aggregate, the applicant has established that his son would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of*

Mendez-Moralez, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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 (citation omitted).

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the applicant's U.S. citizen spouse and children, extreme hardship to his son, the filing of tax returns and the lack of a criminal record for the past nine years. The unfavorable factors include the applicant's convictions and his periods of unauthorized stay.

The AAO finds that the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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 been met.

ORDER: The appeal is sustained.