U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUL 17 2014 Office: WASHINGTON FIELD OFFICE FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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 (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, Washington, DC and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ghana 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 two crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen spouse and child.

In a decision, dated March 21, 2013 the field office director found the applicant inadmissible for having been convicted of two crimes involving moral turpitude, fraudulent use of a credit card and theft. The field office director then found that the applicant had not established that a qualifying relative would suffer extreme hardship as a result of her inadmissibility. The waiver application was denied accordingly.

On appeal, counsel states that the applicant's spouse and child will suffer extreme hardship as a result of the applicant's inadmissibility and that the applicant warrants a favorable exercise of discretion. Counsel submits additional hardship evidence on appeal.

Section 212(a)(2) of the Act states, in pertinent parts:

> (A)(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.
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> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess

> of 6 months (regardless of the extent to which the sentence was ultimately executed).

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.)

For cases arising in the Fourth Circuit, to determine whether a conviction is for a crime involving moral turpitude, an adjudicator first applies the categorical approach. *Prudencio v. Holder*, 669 F.3d 472, 484-485 (4th Cir. 2012) (citing *Taylor v. United States*, 495 U.S. 575, 600–01 (1990)). This requires "look[ing] only to the statutory definition of the state crime and the fact of conviction to determine whether the conduct criminalized by the statute, including the most innocent conduct, qualifies as a [crime involving moral turpitude]." *United States v. Diaz-Ibarra*, 522 F.3d 343, 348 (4th Cir. 2008) (citing *Taylor*, *supra*, at 599-601) (applying the categorical approach to determine whether a conviction is for a crime of violence); *see also Yousefi v. INS*, 260 F.3d 318, 326 (4th Cir. 2001); *Garcia v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006) (citing *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 446 (4th Cir. 2005)).

Where a statute is divisible, encompassing crimes that qualify as crimes involving moral turpitude and crimes that do not, the adjudicator proceeds under the modified categorical approach to review the record of conviction to determine whether the crime of which the alien was convicted qualifies as a crime involving moral turpitude. *Prudencio*, *supra*, at 484-85 (citing *Taylor*, *supra*, at 602); *see also Soliman v. Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005). The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *See Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"). Limiting the review to the record of conviction prevents adjudicators from "finding facts about a past crime under the guise of determining the nature of the crime." *Diaz-Ibarra*, *supra*, at 348 (citing *Shepard*, *supra*, at 24-26). The Fourth Circuit does not permit inquiry beyond the record of

conviction. *Prudencio, supra, at* 484 (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

The record indicates that on January 13, 2005, the applicant was arrested in [redacted] County, New Jersey and on May 13, 2005, the applicant was convicted of fraudulent use of a credit card under New Jersey Statutes (NJSA) 2C:21-6h. The applicant was sentenced to two years probation and fined $1,500. On July 22, 2005 in [redacted] New Jersey, the applicant was convicted of theft by unlawful taking or disposition under NJSA 2C:20-3, was sentenced to two years probation, and was fined $502. The record indicates that the actions related to this conviction occurred on November 6, 2004. The applicant, born on March 27, 1987, was 17 years old at the time of her arrests, but because she was convicted of two crimes she does not qualify for the exception under section 212(a)(2)(A)(ii)(II) of the Act.

At the time of the applicant's conviction, NJSA 2C:21-6h, stated:

> A person who knowingly uses any counterfeit, fictitious, altered, forged, lost, stolen or fraudulently obtained credit card to obtain money, goods or services, or anything else of value; or who, with unlawful or fraudulent intent, furnishes, acquires, or uses any actual or fictitious credit card, whether alone or together with names of credit cardholders, or other information pertaining to a credit card account in any form, is guilty of a crime of the third degree.

Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that "[w]hatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951). Crimes that include as a requirement an intent to defraud have been held to involve moral turpitude. *Matter of Adetiba*, 20 I&N Dec. 506, 512 (BIA 1992).

In the applicant's case, NJSA 2C:21-6h includes an intent to defraud in that the statutory language states that a person convicted under this subsection either "knowingly uses" a stolen or fraudulently obtained credit card or "with unlawful or fraudulent intent" uses a credit card. Therefore, her conviction under NJSA 2C:21-6h is for a crime involving moral turpitude.

At the time of the applicant's conviction, NJSA 2C:20-3, stated:

> a. Movable property. A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.

b. Immovable property. A person is guilty of theft if he unlawfully transfers any interest in immovable property of another with purpose to benefit himself or another not entitled thereto.

At the time of the applicant's conviction, N.J.S.A. § 2C:20-1 stated in pertinent part:

> "Deprive" means: (1) to withhold or cause to be withheld property of another permanently or for so extended a period as to appropriate a substantial portion of its economic value, or with purpose to restore only upon payment of reward or other compensation; or (2) to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it.

Generally, the crime of theft or larceny, whether grand or petty, involves moral turpitude. *Matter of Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974). The common law definition of larceny is a wrongful taking and carrying away of the personal property of someone else with the intent to permanently deprive the owner of that property. *See Matter of V-Z-S-*, 22 I&N Dec. 1338, 1346 (BIA 2000). The Model Penal Code defines theft as the unlawful taking of, or the unlawful exercise of control over, movable property of another with the intent to deprive him thereof. *Id.* at 1343; *see also* Model Penal Code § 223.2(1) (1980). The Board of Immigration Appeals has stated that under the common law, larceny is distinguishable from theft in that larceny includes all takings with a criminal intent to permanently deprive the owner of the rights and benefits of ownership. *Matter of V-Z-S-*, 22 I&N Dec. at 1345-46. By contrast, the Board has noted that theft statutes may encompass both temporary and permanent takings, and that a theft crime involves moral turpitude "only when a permanent taking is intended." *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). Where cash is the object of the theft, it is reasonable to assume intent to permanently deprive. *Id.*

Although the record of conviction in the applicant's case does not indicate which subsection of NJSA 2C:20-3 the applicant was convicted under, it does indicate that the property she stole was cash. Thus, the applicant has been convicted of two crimes involving moral turpitude.

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

> (h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in [her] discretion, waive the application of subparagraphs (A)(i)(I)…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 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…
>
> (2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as [she] 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.

The applicant is seeking a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. Hardship the applicant experiences upon removal is not considered in section 212(h) waiver proceedings unless it is shown that hardship to the applicant is causing hardship to the applicant's qualifying relatives. The qualifying relatives in the applicant's case are her U.S. citizen spouse and U.S. citizen child.

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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (9th Cir. 1998)(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, a statement from the applicant, a statement from the applicant's spouse, statements from the applicant's sisters, and the 2011 U.S. State Department Human Rights Report for Ghana.

The record fails to establish that the hardship the applicant's spouse and/or son would face as a result of the applicant's inadmissibility rises to the level of extreme hardship. Counsel states that the applicant's spouse and child will face extreme emotional and financial hardship as a result of separation. He states that the applicant and her spouse have a strong marital bond and rely on two incomes to pay their expenses. The record does not include any financial documentation to support statements of financial hardship nor does it include documentation to show how the emotional hardship suffered in the applicant's case would go above and beyond the hardship felt by other families facing separation as a result of removal. The country report submitted on appeal does indicate that the applicant could face difficulty in finding employment in Ghana as there is discrimination against women in gaining access to employment and credit. However, this fact alone does not indicate that in the applicant's case separation would cause extreme hardship. The record fails to include any specificity or detail as to the couple's earnings and expenses.

Counsel also states that relocation to Ghana would be an extreme hardship because the economy in Ghana is depressed, there is poor health care as compared to the United States, and the applicant's spouse and child would not have the same educational opportunities in Ghana as they would in the United States. Counsel states further that to relocate, the applicant's spouse would

have to leave his elderly mother and that the move would set into motion emotional, social, and medical forces that are life threatening and detrimental. The record does not support these assertions. Although the country report for Ghana indicates that there are problems within the country, it does not show how someone with the applicant's spouse's background (he was born in Ghana) and training as a Licensed Practical Nurse would experience hardship. Moreover, the record contains no documentary evidence of the applicant's spouse's elderly mother or the closeness of the relationship she has with her son.

In regards to the applicant's son, the record indicates that the applicant's child's father was abusive toward the applicant and that her current spouse is the only father the child knows. The record is not clear as to what would happen to the applicant's son as a result of separation.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Furthermore, the assertions of the applicant and her spouse are relevant evidence and have been considered. However, absent supporting documentation, these assertions cannot be given great weight. *See Matter of Kwan*, 14 I&N Dec. 175, 177 (BIA 1972) ("Information contained in an affidavit should not be disregarded simply because it appears to be hearsay. In administrative proceedings, that fact merely affects the weight to be afforded [it] . . . ."). Thus, the record does not establish that the applicant's spouse and/or child would suffer extreme hardship as a result of the applicant's inadmissibility.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to her U.S. citizen spouse or child as required under section 212(h) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.