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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: MAR 2 1 2014 Office: NEWARK [redacted]

IN RE: [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 (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, Newark, New Jersey, and 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 Jamaica who was found inadmissible 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 seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director* dated May 17, 2012.

On appeal, filed on June 19, 2012 and received by the AAO on October 9, 2013, counsel submits additional evidence of hardship to the applicant's qualifying relative.

The record includes, but is not limited to: statements from the applicant and the applicant's spouse; medical documentation, including a psychiatric report, for the applicant's spouse; financial documentation; the applicant's criminal records; and country-conditions information about Jamaica. 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 part:

> (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.)

In assessing whether a conviction is a crime involving moral turpitude, the adjudicator must first "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). The adjudicator engages in a categorical inquiry, considering the "inherent nature of the crime as defined by statute and interpreted by the courts," not the underlying facts of the criminal offense. *Matter of Short,* 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States,* 495 U.S. 575, 599-600 (1990)). If the statute "defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude." *Matter of Short*, *supra*, at 137.

For cases arising in the Third Circuit, the determination of whether a conviction is a crime involving moral turpitude requires a categorical inquiry into "the elements of the statutory state offense . . . to ascertain the least culpable conduct necessary to sustain conviction under the statute." *Jean-Louis v. Holder*, 582 F.3d 462, 465-66 (3d Cir. 2009) (citing *Knapik v. Ashcroft*, 384 F.3d 84, 88 (3d Cir. 2004)). The "inquiry concludes when [the adjudicator] determine[s] whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a [crime involving moral turpitude]." *Jean-Louis*, *supra*, at 470. However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a crime involving moral turpitude] and others of which are not, [an adjudicator] . . . examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true "even when clear sectional divisions do not delineate the statutory variations . . . ." *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.* 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. at 757; *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"). The Third Circuit does not permit inquiry beyond the record of conviction. *See Jean-Louis*, *supra*, at 473-82 (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

The record reflects that on November 30, 2007, the applicant was convicted of theft by unlawful taking under New Jersey Statutes Annotated (N.J.S.A.) § 2C:20-3 and was placed on probation for 2 years; other charges related to the unlawful possession of a weapon were dismissed. Section 2C:20-3 of the N.J.S.A. states, "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."

Defining the word *deprive*, N.J.S.A. § 2C:20-1 provides 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.

U.S. courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974) ("It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *see also Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966) ("Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude]"). However, the BIA has indicated that a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). The BIA has not clearly defined the meaning of "permanent" in this context. In the subsequently decided *Matter of Jurado-Delgado*, the BIA questioned the premise that "if [an] offense required only an intent to temporarily deprive the owner of the use or benefit of the property taken, the crime would not be one of moral turpitude." 24 I&N Dec. 29, 33 (BIA 2006). The BIA did acknowledge that the intent to permanently deprive the owner of property was necessary to establish moral turpitude, but it also stated that it is "appropriate to consider the nature and circumstances surrounding a theft offense" to determine if a permanent taking was intended. *Id.* The BIA then held that the respondent's conviction for retail theft, which required "proof that the person took merchandise offered for sale by a store without paying for it" was of such a nature that "it is reasonable to assume that the taking is with the intention of retaining the merchandise permanently." *Id.* at 33-34.

We are persuaded that a temporary deprivation lacking larcenous intent occurs only where a defendant borrows property without permission with the intent to return the property in full after a short and discrete period of time. *See Ponnapula v. Spitzer*, 297 F.3d 172, 184 (2nd Circuit 2002). We do not believe that the BIA's decisions stand for the principle that any taking of property, so long as the perpetrator has the intent to return the property at any time in the future, necessarily lacks the requisite mens rea to constitute a crime involving moral turpitude. To possess and use one's property is essential to the right of private ownership, and being deprived of one's property for an extended period of time generally entails significant, if not total, interference with this right.

We find that the deprivation prohibited under N.J.S.A. § 2C:20-3 and N.J.S.A. § 2C:20-1 does not entail mere borrowing of property with the intent to return it, but rather manifests the evil intent characteristic of permanent takings that have been found to involve moral turpitude. Thus, the AAO finds that the applicant's conviction for theft required the intent to permanently take another person's property and is thus a conviction for a crime involving moral turpitude.

As the applicant has not disputed on appeal that his conviction is for a crime involving moral turpitude, and the record does not show the finding of inadmissibility to be erroneous, we will therefore not disturb the finding of the director that the applicant is inadmissible under Section 212(a)(2)(A)(i) of the Act.

As a person found to be inadmissible under section 212(a)(2)(A) of the Act, the applicant is eligible to apply for a waiver under section 212(h) of the Act.

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

> (h) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) … of subsection (a)(2) … if—
>
> . . .
>
> (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.

Section 212(h) of the Act provides that a waiver of inadmissibility 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. The applicant's U.S. citizen spouse and child are qualifying relatives in this case.[1] Hardship the alien experiences upon removal is irrelevant to section 212(h) waiver proceedings and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

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

[1] The record indicates that, at the time of filing the Form I-290B, the applicant and his spouse had one child and his spouse was pregnant.

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. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (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.[2]

The applicant's spouse, in two statements prepared over a two-year period, explains that she is depressed and extremely anxious about the possibility of being separated from the applicant. Moreover, she states that her depression worsened when the child she and the applicant were expecting died *in utero* in January 2012. Medical documents in the record corroborate her assertions. The record includes a letter from a doctor at [redacted] dated May 25, 2012, stating that the applicant's spouse has severe postpartum depression following the loss of their child; she was prescribed anti-depressant medication; and she is very concerned about the possibility of the applicant being deported, which could severely impact her depression. The doctor also notes that the applicant is instrumental in helping his spouse cope with her depression. In addition, the record includes a detailed medical report for the applicant's spouse dated June 5, 2012, following hospitalization for depression. The medical report states that the applicant's spouse

[2] Although the applicant's U.S. citizen son is a qualifying relative, most of evidence in the record concerns hardship to the applicant's spouse. As such, this decision will address whether the applicant has established that his spouse would suffer extreme hardship if his waiver application is not approved.

has a history of depression, she also suffers from anxiety, and she claims that she sometimes feels like cutting herself to relieve stress. The report notes that she claims she was self-mutilating as a teen. The medical report also notes that the applicant's spouse was pregnant and, due to the uncertainty of the applicant's immigration status, was considering having an abortion because she could not take care of the baby without him.

The applicant's spouse also states that the applicant financially supports her and their family and that she will suffer financial hardship if his waiver application is not approved. The applicant's spouse explains that she attends school and relies on the applicant's income for support. The record includes a copy of a 2010 federal income tax return, indicating that the applicant and his spouse had an adjusted gross income of $11,375. The record also includes an employment letter for the applicant, indicating that he has worked at a staffing agency as a captain and server, earning between $12.00 and $15.00 per hour, since 2010. The applicant states that he does not know how his wife will be able to earn enough money to support herself and their son if he returns to Jamaica.

The applicant's spouse states that, although her parents and her brother reside in the United States, her parents are separated and are not in good health, and her brother has his own family with five children to support. The applicant's spouse states that she has lived independently for many years and cannot rely upon her parents or her brother for emotional or financial support.

The record establishes that the applicant's spouse is experiencing serious psychological hardship, and evidence in the record indicates that her psychological condition will deteriorate if she is separated from the applicant. The record further indicates that she will suffer financial hardship if she is separated from the applicant, as she will be unable to support herself and their son. Additionally, she appears to lack a close connection to family members who could assist her. These hardships, when considered in the aggregate, are beyond the common results of removal and rise to the level of extreme hardship if she remains in the United States without the applicant.

Concerning the hardship the applicant's qualifying relative would experience if she were to relocate to Jamaica, the applicant's spouse states that her parents and brother reside in the United States; there is no indication in the record that the applicant's spouse has family in Jamaica. The applicant states that he has family in Jamaica, but his father is in prison and his three sisters have their own families; therefore he and his family would have no one to live with in Jamaica. Additionally, the applicant's spouse was born in the United States and is unfamiliar with the culture of Jamaica.

The applicant's spouse also states that she would not feel safe living in Jamaica and would worry about the safety of their son due to the gang violence in the parts of Kingston, where the applicant is from. The applicant submits country-conditions information on Jamaica, including the U.S. Department of State 2010 Human Rights Report on Jamaica, which states that in 2010, violent crime was rampant and reliable accounts showed that security forces in Jamaica committed unlawful or unwarranted killings. The report adds that violence and discrimination against women, violence against and sexual abuse of children, and trafficking in persons exist in Jamaica. *See 2010 Country Reports on Human Rights Practices: Jamaica, Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, April 8, 2011.* Moreover, according to the Bureau of Consular Affairs for the U.S. Department of State, "Violence and shootings occur regularly in certain areas of Kingston

and Montego Bay." The report also states that "random acts of violence, such as gunfire, may occur anywhere." *See* http://travel.state.gov/content/passports/english/country/jamaica.html, accessed March 13, 2014. In addition, the Jamaica 2013 Crime and Safety Report, issued by the Bureau of Diplomatic Security of U.S. Department of State, states:

> Kingston is rated "Critical" for crime by the Department of State due to a high frequency of criminal activity throughout Jamaica. Violent crime is a serious problem, particularly in Kingston.... With a population of approximately 2.7 million people, the number of murders and other violence places Jamaica in the top five tiers of the highest per capita homicide rates in the world. Most violent crimes, in particular murder, involve firearms.

See https://www.osac.gov/pages/ContentReportDetails.aspx?cid=14289, accessed March 13, 2014.

The applicant's spouse states that she would worry about the safety of their son if she were to relocate to Jamaica and is concerned about other hardships that their son would experience, claiming his education if they were to relocate would not be meet the standards of education that he would receive in the United States.

Concerning financial hardship to his spouse, the applicant states that he does not believe that he would be able to work and earn enough money in Jamaica to support their family. The applicant's spouse asserts that she would be unable to complete her education or find work in Jamaica.

The record supports finding that the applicant's spouse would experience extreme hardship, were she and their son to relocate to Jamaica. The hardships to the applicant's spouse and child stem in part from having been born in the United States and being unfamiliar with the culture of Jamaica. Moreover, the applicant's spouse lacks family ties to Jamaica other than the applicant, and objective evidence supports her concerns about their safety due to crime and violence in Jamaica. Additionally, it appears the applicant's spouse would experience financial hardship there. The AAO finds these hardships, in the aggregate, rise to the level of extreme hardship. The applicant has established that his spouse and child would suffer hardship beyond the common results of removal if they were to relocate to Jamaica to reside with him.

The AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. 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 . . . 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 criminal conviction for theft, as well as his unauthorized employment and unauthorized presence in the United States. The favorable factors in this matter are the extreme hardships to his U.S. citizen spouse and hardships to their son if the waiver application is not approved; the applicant's successful completion of his probation; and the mitigating factors identified when the applicant was convicted, which included his willingness to participate in a program of community service, his lack of prior criminal activity, and his willingness to cooperate with law-enforcement authorities. In sum, the crime committed by the applicant is serious in nature. However, the favorable factors in this matter outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

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.