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U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

H<sub>2</sub>

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: OCT 31 2007

IN RE:

Applicant:

[Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the application will be denied.

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 been convicted of a crime involving moral turpitude. The applicant seeks a waiver of his ground of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The director determined that the applicant had failed to establish a qualifying family member would suffer extreme hardship if the applicant were denied admission into the United States. The applicant's Form I-601, Application for Waiver of Ground of Inadmissibility (I-601 Application) was denied accordingly.

On appeal the applicant indicates, through counsel, that the director did not properly analyze his hardship claim, and the applicant asserts that under U.S. Citizenship and Immigration Service (CIS) policy, he should have received a personal interview in Florida regarding his application. On this basis, the applicant requests, through counsel, that his case be remanded to the Miami District Office for a personal interview and re-adjudication of his claim. The applicant asserts further that the criminal theft conviction under which he was found to be inadmissible, is a divisible statute containing elements that do, and do not, involve moral turpitude. The applicant asserts through counsel, that the record is unclear as to whether he was convicted under statutory provisions involving moral turpitude or not, and the applicant indicates federal case law provides that he is not guilty of a theft crime involving moral turpitude if he was convicted under temporary appropriation statutory provisions, rather than a permanent taking of property statutory provisions. The applicant asserts, through counsel, that even if he is found to be inadmissible for a crime involving moral turpitude, the evidence in the record establishes that his wife and children will suffer extreme hardship if he is unable to remain in the United States with them, or if they moved to Cuba in order to be with the applicant. The applicant concludes that his I-601 application should therefore be approved.

In support of his request to remand the present matter to the Miami District Office for a personal interview and re-adjudication of his claim, counsel asserts on behalf of the applicant that a January 5, 2005, CIS Interoffice Memorandum by Associate Director, [REDACTED] states that personal interviews should be conducted by district offices in all IDENT, criminal violation, adjustment of status cases. Counsel for the applicant asserts that criminal conviction, waiver of inadmissibility cases present complex issues that require a personal interview. Counsel asserts further that it is CIS policy to conduct personal interviews in such cases.

The AAO notes that the contents of the interoffice memorandum referred to by counsel are for CIS interoffice guidance purposes. Counsel has provided no authority to establish that the contents of a CIS interoffice memorandum provide a right of action to an applicant. The AAO notes further, upon review of the interoffice memorandum, that the purpose of the memorandum is to help eliminate CIS backlogs by reducing the number of cases transferred from service centers to district offices. Although the interoffice memorandum does indicate that non-immigration violation IDENT cases should be sent to district offices for interview, the interoffice memorandum also states that:

Generally, interviews should be viewed as necessary when the decision to grant or deny the benefits would benefit from the back and forth questioning of an interview or an assessment of credibility. Interviews should not be used to obtain information that can be readily requested and provided in response to an RFE [Request for Evidence].

The interoffice memorandum states further that adjudicators are “[e]xpected to use their judgment about transferring cases for interview whether or not the case falls within the transfer criteria described. . . .”

In the present matter there were no issues of credibility, and the FBI report clearly demonstrated the existence of the applicant’s criminal record. Moreover, on April 20, 2006, the director provided the applicant with additional time to submit information relating to his criminal record and ground of inadmissibility, and his extreme hardship claim. The AAO finds that the applicant has failed to demonstrate that the present case involves unique factors or issues of law that cannot be adequately addressed in writing. It thus appears that the director complied with interoffice memorandum guidance in the present matter. Furthermore, even if the director had committed a procedural error by failing to send the applicant’s case to the district director for interview, the applicant has been provided with the opportunity to supplement the record on appeal. The AAO finds that no purpose would therefore be served in remanding the matter to the Miami District Office.

Section 212(a)(2)(A)(i) of the Act provides in pertinent part that:

[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

- (1) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

FBI report evidence contained in the record reflects that on April 18, 2000, the applicant was convicted of Grand Theft 10K or More, Less than 20K Dollars, a 3<sup>rd</sup> Degree Felony, in violation of Florida Statute 812.014(2C3), and that he was sentenced to 2 ½ years probation. The applicant does not contest that he was convicted under Florida Statute 812.014(2C3). He asserts however, through counsel, that the statute is divisible, and that the record is unclear as to whether his theft conviction was for a theft crime involving moral turpitude.

Florida Statutes 812.014 provides in pertinent part that:

- (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.

....

(2)(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

3. Valued at \$10,000 or more, but less than \$20,000.

Counsel refers to the U.S. Eleventh Circuit Court of Appeals case, *Jaggernaut v. United States*, 432 F.3d 1346 (11<sup>th</sup> Cir. 2005), and the Board of Immigration Appeals (Board) case, *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973), to support her assertion that the evidence in the record fails to establish that the applicant was found guilty of a theft crime involving moral turpitude, because Florida Statute 812.014 encompasses both permanent and temporary takings, and the record does not clearly establish under which section the applicant was convicted.

In *Jaggernaut v. U.S.*, the U.S. Eleventh Circuit Court of Appeals found that Florida Statute 812.014(1) included two distinct intent standards and that, “[t]he fact of conviction and the statutory language alone are insufficient to establish by clear, unequivocal, and convincing evidence, - under which subpart Jaggernaut was convicted.” See *Jaggernaut v. U.S.*, *supra* at section 5 (pagination unavailable.) The U.S. Circuit Court of Appeals indicated that in a deportation (now removal) hearing, the government had the burden of establishing by clear and convincing evidence that the respondent was removable as an aggravated felon, based on a theft conviction under Florida Statute 812.014(1), and the U.S. Circuit Court of Appeals found that, “[n]o deportation order [removal order] may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation [removal] are true.” *Id.* (Citing *Woodby v. INS*, 385 U.S. 276, 286 (1966.)) The U.S. Circuit Court of Appeals noted in section 6 that:

[T]he record of conviction introduced in this case – the Information, plea, judgment and sentence- do not provide clear, unequivocal and convincing evidence that Jaggernaut’s 2001 grand theft conviction under § 812.014(1) was for a taking with the intent to deprive another of their rights or benefits of property. . . . *Id.*

The U.S. Eleventh Circuit Court of Appeals found that the government had therefore failed to meet its burden of establishing that Jaggernaut’s conviction was an aggravated felony theft conviction for removal proceedings purposes.

The present record contains an FBI report reflecting the applicant’s plea, that he was convicted of Grand Theft 10K or More, Less than 20K Dollars, a 3<sup>rd</sup> Degree Felony, in violation of Florida Statute 812.014(2C3), and that he was sentenced to 2 ½ years probation. The record also contains the Information reflecting that the charge made against the applicant contained both intent sections of Florida Statute 812.014(1). The applicant did not submit the court disposition for his case, and he submitted no other details relating to his criminal conviction.

The AAO notes that, unlike a removal hearing in which the government bears the burden of establishing a respondent’s removability, the burden of proof in the present proceedings is on the applicant to establish his eligibility for the immigrant visa and waiver of inadmissibility benefits sought. See section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that the applicant has failed to overcome the director’s finding that he was convicted of a theft crime involving moral turpitude.

The Board stated in *Matter of Grazley, supra* at 333, that a theft is ordinarily considered to involve moral turpitude when a permanent taking is intended. The Board indicated that in the case of a divisible statute, it was permissible to look beyond the statute to consider the record in order to determine whether the conviction was rendered under the portion of the statute dealing with crimes involving moral turpitude. The Board found in *Grazley* that although it had "[n]o direct evidence as to what the respondent's intent was at the time he took [a] purse . . . it is reasonable to assume, since cash was taken, that he took it with the intention of retaining it permanently."

The U.S. Eleventh Circuit Court of Appeals stated in *Jaggernaut v. U.S., supra* at section 5, that:

[A] taking of property constitutes a 'theft' whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent." (Citing *In re V-Z-S-*, 22 I&N Dec. 1338, 1346 (BIA 2000.)) Other Circuits have adopted similar definitions. See, e.g., *United States v. Corona-Sanchez*, 291 F. 3d 1201, 1205 (9<sup>th</sup> Cir. 2002) (defining theft offense as "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent" . . . .

The U.S. Eleventh Circuit Court of Appeals refers to the *Blacks Law Dictionary* (7<sup>th</sup> ed. 1990) definition of "appropriation" in section 5 of the *Jaggernaut* case, stating that it is defined as the "exercise of control over property; a taking of possession. . . ."

In the present matter the record reflects that the applicant was convicted of Grand Theft 10K or More, Less than 20K Dollars, a 3<sup>rd</sup> Degree Felony, in violation of Florida Statute 812.014(2C3). The applicant's conviction clearly reflects that it was related to the taking of money or property valued between \$10,000 and \$20,000, moreover, the applicant did not submit a court disposition or any other evidence to demonstrate that the crime he was convicted of did not involve an intent to take another's property. Upon review of the evidence in the record, the AAO finds that it is reasonable to assume that the applicant took money or property valued between \$10,000 and \$20,000, with the intention of retaining it permanently, as discussed in *Matter of Grazley*, and with the intent to deprive the owner of the rights and benefits of ownership, as discussed in *Jaggernaut v. U.S., supra*. Accordingly, the AAO finds that the applicant failed to overcome the director's finding that he was convicted of a crime involving moral turpitude. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(1) of the Act.

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

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

. . . .  
(1)(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is

established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

Section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

The record reflects that the applicant married a naturalized U.S. citizen on October 1, 2000, and that he has a U.S. lawful permanent resident stepdaughter, born November 27, 1992, and a U.S. citizen son, born June 10, 2002. The applicant's wife and son are qualifying family members for section 212(h) of the Act, extreme hardship purposes. Moreover, section 101(b) of the Act, 8 U.S.C. §1101(b) provides in pertinent part that:

As used in titles I and II- (1) The term "child" means an unmarried person under twenty-one years of age who is . . . (B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred.

The applicant's stepdaughter was under the age of eighteen at the time of the applicant's marriage to her mother. She therefore qualifies as a child and qualifying family member for section 212(h) extreme hardship purposes.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of relevant factors in determining whether an alien has established extreme hardship. 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. The Board held in *Matter of Ige*, 20 I&N Dec. 880, 882, (BIA 1994), that, "relevant [hardship] factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists."

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991). In *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996), the U.S. Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The U.S. Ninth Circuit Court of Appeals emphasized that the common results of deportation are insufficient to prove extreme hardship.

The record contains the following evidence relating to the applicant's extreme hardship claim:

A May 12, 2006, affidavit signed by the applicant's wife [REDACTED] indicating that she and her husband have a loving relationship and that he supports their family financially so that

she can care for their two children and attend nursing school [REDACTED] indicates that she is pregnant and expects to give birth to a third child in September 2006. She also indicates that her nursing school graduation date will be in August 2006. [REDACTED] states that she depends on the applicant's financial support, and that she fears she and her family will lose their home and standard of living if the applicant is denied admission into the United States. Mrs. [REDACTED] indicates further that her children are very close to the applicant, and that he is a father figure to his stepdaughter. [REDACTED] states that she does not want to raise her children in communist Cuba, and that she and her family have no source of support in Cuba.

School transcripts reflecting that the applicant's stepdaughter attends middle school in Miami-Dade County, Florida.

A copy of the applicant's 2005 Real Estate Property Taxes reflecting his home ownership and reflecting tax assessments in the amount of \$5,430.26.

School transcripts reflecting [REDACTED] enrollment in a nursing program at Miami-Dade College, and her completion of an Associate in Arts Degree at the college on December 20, 2003.

2003-2005 Federal income tax returns reflecting that the applicant and his wife filed jointly, and reported gross annual incomes between \$10,000 and \$15,000.

Cuban country conditions information from Human Rights Watch and the U.S. Department of State reflecting that: political dissent is repressed via the criminal code in Cuba; travel to and from Cuba must be authorized by the government; Cuba is a totalitarian controlled state; most individuals are employed by the Cuban state; and private sector economic opportunities are limited.

The AAO has reviewed the totality of the evidence contained in the record. Upon review of the evidence, the AAO finds that the applicant has failed to demonstrate that his wife and children would suffer extreme hardship if his waiver of inadmissibility were denied and they remained in the United States. The AAO notes that 2005 federal poverty guideline information reflects that an annual income of less than \$16,090 for a family of three constitutes poverty, thus allowing for financial eligibility for certain federal program purposes. See <http://aspe.hhs.gov/poverty>. The federal income tax evidence submitted by the applicant reflects that his annual earnings are below the federal poverty threshold, and the record lacks evidence to corroborate the claim that the applicant, alone, provided financially for his family, and if so, how the applicant paid his home expenses, provided a quality standard of living for his family, and paid for his wife's education with his earnings. The AAO notes further that, "[t]he mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship." See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). The affidavit and school transcript evidence contained in the record additionally fail to establish that the applicant's wife and children would suffer any other hardship beyond that which is normally expected upon the removal of a family member, if the applicant were denied admission into the United States. The

evidence in the record also fails to demonstrate that the applicant's wife and children would suffer extreme hardship if they moved with him to Cuba. The applicant's wife summarily states that she does not want to raise her children in Communist Cuba and that she has no source of support there. The AAO finds these assertions to be vague and lacking in detail. Moreover, the country conditions information submitted on appeal is general, and the applicant has failed to demonstrate a basis upon which his family would suffer mistreatment or financial hardship in Cuba. Having found the applicant ineligible for relief, the AAO notes no purpose in discussing whether the applicant merits a waiver as a matter of discretion.

Section 291 of the Act provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has failed to meet his burden in the present matter. The appeal will therefore be dismissed, and the application will be denied.

**ORDER:** The appeal is dismissed. The application is denied.