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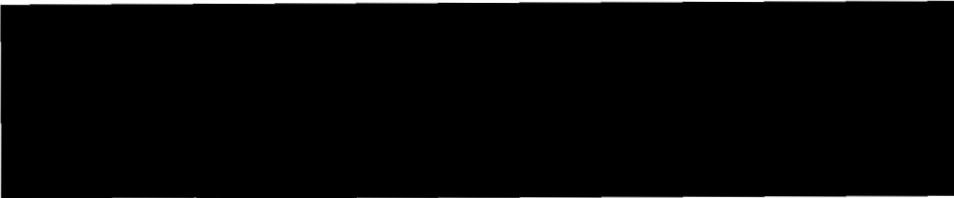
Date: MAY 12 2008

IN RE:



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:

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 District Director, Baltimore, Maryland, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The waiver application will be denied.

The applicant, a citizen of Guatemala, was found inadmissible to the United States 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 is the spouse of a United States citizen and the father of a United States citizen, and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his family.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed on his wife and son and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

Section 212(a)(2) of the Act provides, in pertinent part:

(A)(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.

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

* * *

(I) 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).

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

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

(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 . . .

In adjudicating cases such as this, the AAO considers first whether the crimes at issue involved moral turpitude. If they did, the first issue to consider is whether the applicant qualifies for the "petty offense exception" at

section 212(a)(2)(A)(ii)(I). If the applicant qualifies under the petty offense exception, no waiver is necessary, as the applicant is not inadmissible. If the applicant does not qualify under the petty offense exception, and is therefore inadmissible and in need of a waiver, the AAO considers whether extreme hardship would accrue to a qualifying relative in the event the waiver application is denied.

Accordingly, the AAO will first address the question of whether the applicant committed a crime involving moral turpitude. The BIA and U.S. courts have found that it is the “inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction” and not the facts and circumstances of the particular person’s case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the “statutory provision . . . encompasses at least some violations that do not involve moral turpitude”). As a general rule, if a statute encompasses acts that both do and do not involve moral turpitude, deportability cannot be sustained. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003), *reh’g denied* 343 F.3d 1075 (9th Cir. 2003). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS, supra*. Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994).

Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962), the court looks to the “record of conviction” to determine if the crime involves moral turpitude. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999) (look to indictment, plea, verdict, and sentence; *Zaffarano v. Corsi*, 63 F.2d 67 757 (2d Cir. 1933); *U.S. v. Kiang*, 175 F.Supp.2d 942, 950 E.D. Mich. 2001). A narrow, specific set of documents comprises the record of conviction: “[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005). The Ninth Circuit has further clarified that that the charging document, or information, is not reliable where the plea was to an offense other than the one charged. *Martinez-Perez v. Gonzales*, 417 F.3rd 1022, 1028-29 (9th Cir. 2005). It is also important to note that the record of conviction does not include the arrest report. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996).

Courts have described the two separate ways of analyzing crimes as the “categorical” and “modified categorical” approaches. The former looks solely to the structure of the statute of conviction to determine whether a person has been convicted of a designated crime; the latter looks to a limited set of documents in the record of conviction in cases where the statute of conviction was facially over inclusive. *See, e.g., Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002).

The record contains a certified copy of a July 5, 1999 record from the Criminal Division of the Superior Court of the District of Columbia, which establishes that the applicant was charged with three offenses on July 4, 1999: (1) assault with a dangerous weapon; (2) inciting a riot; and (3) possession of a prohibited weapon. However, on July 5, 1999, the first two charges were dropped, and he was charged with possession of a prohibited weapon. The record also contains a certified copy of the judgment, which establishes that the applicant pleaded guilty to possession of a prohibited weapon. On September 7, 1999, he was sentenced to a one-year suspended jail sentence (“extended suspended sentence”); one year of supervised probation; and a \$50

fine. According to a letter from the District of Columbia Court Services and Offender Supervision Agency, the applicant's case was "Closed—Expired Satisfactorily" on September 6, 2000.

The records before the AAO do not provide the citation of the statute to which the applicant pleaded guilty. They simply state that he pleaded guilty to possession of a prohibited weapon, section "b." The section under which the applicant was convicted appears to be section 22-4514(b) of the District Of Columbia Official Code. D.C. Code § 22-4514 (1981) states, in relevant part, the following:

§ 22-4514. Possession of certain dangerous weapons prohibited; exceptions.

* * *

- (b) No person shall within the District of Columbia possess, with intent to use unlawfully against another, an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other dangerous weapon.
- (c) Whoever violates this section shall be punished as provided in § 22-4515 unless [exceptions omitted, as they do not apply to this case]

As D.C. Code § 22-4514 (1981) is multi-sectional, it may be considered divisible. Therefore, the District Director was justified in looking to the record of conviction to determine the elements of the applicant's crime, which would then be considered in a determination of whether the offense involved moral turpitude.

However, as noted above, the record of conviction includes a limited set of documents and does not include the police record. *See In re Teixeira*, 21 I&N Dec. 316, 319-20 (BIA 1996). The AAO notes that the District Director's decision referred to the lack of a police record in the record as the basis for a finding that the applicant's conviction was for a crime involving moral turpitude. The District Director erred in his analysis: the only documents in this case that comprise the record of conviction for purposes of ascertaining the details of the applicant's crime are the court record and the judgment.

Although the AAO disagrees with the District Director's request for police records, and his reliance upon the lack of those documents as the basis for his finding that the applicant's crime was one involving moral turpitude, it nonetheless agrees with his determination that the applicant's crime was in fact one involving moral turpitude, as intent to use the prohibited weapon is a component of the statute to which the applicant pleaded guilty.

Having found that the applicant was convicted of a crime involving moral turpitude, the AAO next turns to the question of whether the applicant qualifies under the petty theft exception. As set forth previously, an applicant qualifies under this exception if: (1) the applicant committed only one crime; (2) the maximum penalty possible for the crime of which the applicant was convicted (or admits having committed, or of which the acts applicant admits having committed constituted the essential elements of) did not exceed imprisonment for one year; and (3) if the applicant was convicted, the applicant was not sentenced to a term of imprisonment in excess of six months, regardless of the extent to which the sentence was ultimately executed.

D.C. Code § 22-4515 (1981) states the following:

Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than \$1,000 or imprisonment for not more than 1 year, or both.

The applicant does not qualify for the petty offense exception. He was convicted of only one crime involving moral turpitude, and D.C. Code § 22-4515 (1981) confirms that the maximum sentence possible was not more than one year. However, the applicant was sentenced to a term of imprisonment in excess of six months: although it was suspended, he was nonetheless sentenced to a term of imprisonment of one year. He does not qualify for the petty offense exception.

Having found the applicant ineligible for the petty offense exception, the AAO turns next to the section 212(h)(1)(B) of the Act. The first issue to be addressed is whether the applicant's inadmissibility would impose extreme hardship on a qualifying family member. If extreme hardship is established, the AAO will then make an assessment as to whether it should exercise discretion and grant the waiver under section 212(h)(1)(B) of the Act.

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 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court of Appeals for the Ninth Circuit defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. The United States Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA held in *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) that:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion favorably to the applicant. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The applicant's wife is a twenty-two-year-old citizen of the United States. She and the applicant have been married since January 6, 2004 and have a five-year-old son, who is also a citizen of the United States.

In his October 19, 2004 affidavit, the applicant states that he has known his wife since 1999; that he is highly regarded at work; that he has a loving marriage; that he provides a healthy home life for his wife and son; that that he has been very involved in the upbringing of his son; that he and his wife have been through the stresses and worry of parenting together; that their son had to have surgery on one of his testes when he was an infant; that, because of the operation, he tries to make sure his son does not get hurt while playing and sometimes has to tell other children not to be rough; that he has been very responsible in providing a stable environment for his wife and son; that the house in which the family lives is in a quiet, family-oriented neighborhood; that he is proud of the house in which they live; that the family can visit relatives who also live in the neighborhood; explains the circumstances surrounding his 1999 arrest; that he is always encouraging his wife to go to school; that he is always looking in to opportunities for his wife; that if his wife wants to go to college he would pay for it; that he is willing to work extremely hard to be successful so that she and their son can live happy lives with no financial worries; that, while his wife is the best mother in the world, her heart would be broken if the applicant moved to Guatemala without her, and that her sadness would ultimately have a bad effect on their son; that he is present when their son goes to sleep as well as when he wakes up, and that he would miss the applicant greatly; that bringing their son to Guatemala is not realistic, as he would not adjust well to life in that country; that Guatemala does not seem like a safe place for his wife and son, as there is a great deal of gang violence and civil strife, especially in the larger towns in which they would have to live in order for the applicant to find work; that he has heard the crime situation in Guatemala is getting worse; that he would not want to put his family through the instability and fear of life in Guatemala because of his own immigration problems; that he would be unable to provide for his wife and child from Guatemala if they remained in the United States without him; that his wife would likely require public assistance if she were to raise their son without the applicant, as she would have a difficult time providing for herself financially; that his wife does not have a high school degree or the skills necessary to pay for a home, daycare, and other living expenses; and that his son would be emotionally and psychologically affected by the applicant's absence, as he relies upon the applicant's presence in his life.

In his June 6, 2005 affidavit, the applicant states that he is a good member of the community; that he is an excellent husband and father; that he realizes he used poor judgment on that day in July 1999; that he remains devoted to his wife and son; and that he hopes CIS will consider the extreme hardship that his wife and son will face if he is not permitted to remain in the United States.

In her October 19, 2004 affidavit, the applicant's wife states that she and the applicant are very much in love; that the applicant is very supportive; that, as a result of the operation their son had to have on one of his testes when he was an infant, it is unclear whether he will be able to have children when he is an adult; that the applicant is a great father; that their son waits at the window to watch for the applicant to come home from work; that the applicant sometimes takes their son grocery shopping; that, although she has family in the area, she depends entirely upon the applicant for financial support; that the applicant is supporting as a friend; that the applicant has encouraged her to continue her education; that she cannot think of a more loving father and husband; that the applicant usually goes to church with her and respects her devotion to her faith; that her family is very supportive of her marriage to the applicant; that it would be catastrophic for the applicant to return to Guatemala; that she would be devastated by the loss of her best friend and father of her son; that her husband is not only a financial support but is also involved in the routine activities of the household; that she is not working and depends entirely upon the applicant for financial support; that she would never be able to earn enough money to remain in their present home, which is in a safe neighborhood with a park nearby; that she has no real work experience and would likely face difficulty making ends meet; that she would be forced to place their son in daycare, which would be a huge expense; that it would cause their son emotional trauma to lose not only his father but also his mother for several hours each day; that the applicant, despite the single bad incident in 1999,

is a very good person who cares about people; that she has spent her entire life in the United States; and asks that the waiver application be approved.

The record also contains letters from the applicant's employer, brother, and neighbor, as well as from his mother-, father, and sister-in-law, all attesting to his good moral character and the important role he plays in his wife's and son's lives.

The record also contains a psychological evaluation from [REDACTED], dated October 8, 2004. [REDACTED] concluded that the applicant is a very committed and involved father and husband, and that if he were required to depart the United States, it would create a serious emotional, social, and financial loss to his wife and son.

Courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances."); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship).

In the instant case, the applicant is required to demonstrate that his wife or son would face extreme hardship in the event the applicant is required to return to Guatemala, regardless of whether they join him in Guatemala or remain in Maryland without him. In limiting the availability of the waiver to cases of "extreme hardship," Congress provided that a waiver is not available in every case where a qualifying family relationship exists.

The AAO finds that the applicant's son would face extreme hardship if he were to relocate to Guatemala with the applicant. He has resided in the United States since birth and, as a five-year-old American citizen, is likely fully integrated into the United States lifestyle and education system. In *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001), the BIA found that a fifteen-year-old child who had lived her entire life in the United States, was completely integrated into the American lifestyle, and was not fluent in the Chinese language, would suffer extreme hardship if she relocated to Taiwan. The AAO finds that a similar fact pattern has been established in this case.

However, the record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's wife or their son would face extreme hardship if the applicant returns to Guatemala without them. The record does not establish that they would face greater hardships than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse or parent is removed from the United States. That the applicant's wife would have to obtain employment, place her son in daycare, and possibly be required to move to a new home, is a common occurrence upon the removal of a spouse, as are the other costs, both financial and emotional, of separation as outlined in the applicant's and his wife's letters. These costs are faced by many in the applicant's wife's and son's situations, and the record fails to establish that the hardships they would face would be greater than those faced by others. Nor has the applicant established why his wife's extended family, who live in the area and visit the home frequently, would

be unable to assist his wife and son financially and with childcare. Although CIS is not insensitive to their situation, the emotional and financial hardship of separation are common results of separation and do not rise to the level of “extreme” as contemplated by statute and case law.

Nor does [REDACTED]’s psychological evaluation establish extreme hardship. Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted letter appears to be based upon a single interview between [REDACTED] and the family. The conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering [REDACTED] findings speculative and diminishing the evaluation’s value to a determination of extreme hardship. Moreover, the AAO notes that [REDACTED] has failed to identify any hardships to be faced by the applicant’s wife or son that are unique to this case.

In nearly every qualifying relationship, there is a deep level of affection and a certain amount of emotional and social interdependence. While the prospect of separation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of “*extreme* hardship,” Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in INA § 212(i), be above and beyond the normal, expected hardship involved in such cases. In adjudicating this appeal, the AAO finds that the record fails to demonstrate that the applicant’s wife and son would suffer hardship beyond that normally expected upon the removal of a spouse or parent.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to demonstrate that his United States citizen wife or son would suffer hardship that is unusual or beyond that normally expected upon the removal of a spouse or parent. As noted previously, the common results of deportation or exclusion are insufficient to prove extreme hardship; the emotional hardship caused by severing family and community ties and the financial hardship that results from separation are common results of deportation and do not constitute extreme hardship. “Extreme hardship” has been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not sustained that burden.

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