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**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: BALTIMORE

Date: **NOV 24 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 "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Baltimore District Office. 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 Japan 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 her 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 to the United States. The applicant's Form I-601, Application for Waiver of Ground of Excludability (now referred to as Inadmissibility), was denied accordingly.

On appeal, counsel asserts that the applicant has been married to her United States citizen husband since June 14, 2001. Counsel contends that the applicant and her husband have grown to depend on each other in ordinary and extraordinary ways. Counsel references a report from [REDACTED] of Clinical Psychology and a licensed Clinical Professional Counselor. Counsel states that [REDACTED] has categorized the applicant's husband as having severe depression. Counsel states that [REDACTED] has found that the applicant's potential departure is an extreme hardship to the applicant's husband. Counsel contends that the applicant's father-in-law is suffering the effects of a recent stroke and the applicant's husband is his means of support and help. Counsel notes that the applicant's March 8, 1997 conviction for theft has been expunged and she no longer has a criminal record.

A Federal Bureau of Investigation (FBI) report based upon the applicant's fingerprints reveals that she was arrested on March 7, 1997 in Baltimore, Maryland and charged with *Petty Theft*. The court disposition related to this arrest shows that on July 29, 1997, the District Court of Maryland for Baltimore County convicted the applicant of theft of less than a \$300 value pursuant to section 342 of the Maryland Annotated Code. The Court issued a verdict of Probation Before Judgment and placed the applicant on probation for a period of 12 months with a requirement that she complete 50 hours of community service (Docket [REDACTED]). The sentence of probation is a restraint on the applicant's liberty and, therefore, constitutes a conviction pursuant to section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). The maximum possible penalty for a conviction of theft of less than a \$300 value is a term of imprisonment of not more than 18 months and/or a fine of not more than \$500. Md. Crimes and Punishments Code Ann. § 342 (Michie 1997).

The applicant furnished, on appeal, an Order for Expungement of Police and Court Records from the District Court of Maryland for Baltimore County ordering the expungement of police records pertaining to the arrest, detention, or confinement of the applicant on or about March 8, 1997. Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of [REDACTED]*, I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute,

rather than a rehabilitative provision, remains vacated for immigration purposes). The applicant, therefore, remains convicted for immigration purposes.

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

(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.

Crimes involving moral turpitude are generally defined as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *See Jordan v. De George*, 341 U.S. 223, 71 S.Ct. 703 (1951); *Matter of Serna* 20 I&N Dec. 579, 581 (BIA 1992). 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). 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).

The Board of Immigration Appeals (BIA) has held that petit larceny is a crime involving moral turpitude. *See, e.g., Matter of Esfandiary*, 16 I&N Dec. 659, 661 (BIA 1979). 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; *See Matter of Westman*, 17 I&N Dec. 50 (BIA 1979). 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 (BIA 1973). The section of the Maryland Annotated Code under which the applicant was convicted enumerates several definitions for theft.

Section 342 of the Maryland Annotated Code (1997) provides in pertinent part that:

- (a) Obtaining or exerting unauthorized control. – A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over property of the owner . . .
- (b) Obtaining control by deception. – A person commits the offense of theft when he willfully or knowingly uses deception to obtain and does obtain control over property of the owner . . .
- (c) Possession of stolen property. – (1) A person commits the offense of theft if he possesses stolen personal property knowing that it has been stolen, or believing that it has probably been stolen . . .
- (d) Obtaining control of lost, mislaid or mistakenly delivered property. – A person commits the offense of theft when he obtains control over property of another which he knows to have been

lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or nature or amount of the property . . .

- (e) Obtaining services by deception. – A person commits the offense of theft when he obtains the services of another which are available for compensation by: (1) Deception; or (2) Knowing that the services are provided without the consent of the person providing them. . . .

The applicant's record of conviction does not specify the section in the statute under which she was convicted. However, each section of this statute requires the applicant's intent to permanently deprive ownership of property or obtain a service by deception. Therefore, a conviction under any part of the above statute is a conviction for a crime involving moral turpitude. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) 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 denial notice in this case assesses the applicant's eligibility for a waiver under section 212(i) of the Act, 8 U.S.C. 1182(i). However, section 212(i) of the Act only pertains to waivers of inadmissibility under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or willful misrepresentation of a material fact. As discussed, the waiver provision applicable to this case is section 212(h) of the Act, 8 U.S.C. § 1182(h). Nevertheless, the director's actions must be considered to be harmless error because the provisions under sections 212(i) and 212(h) of the Act delineate parallel standards of extreme hardship to an alien's spouse.

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 the United States; 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 (9th Cir. 1991). In *Perez v. INS*, 96 F.3d 390 (9th 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 Court emphasized that the common results of deportation are insufficient to prove extreme hardship. *Id.*

The record reflects that the applicant married a naturalized United States citizen on June 14, 2001. The applicant’s husband is a qualifying family member for section 212(h) of the Act extreme hardship purposes. As evidence of extreme hardship the applicant furnished a psychological evaluation, dated April 4, 2006, from [REDACTED] states in her evaluation that the applicant’s husband, [REDACTED] is her patient, and as of the date of the letter, she had seen him for three office visits. She indicates that [REDACTED] scored the highest category of severe on the Beck Depression Inventory and the highest category of severe on the Burns Anxiety Inventory. [REDACTED] states that the applicant’s departure from the United States would cause [REDACTED] extreme hardship. She states that if [REDACTED] were asked to leave the United States with the applicant, he would decompensate emotionally and lose his career status and extensive social support system. [REDACTED] contends that [REDACTED] suffers from hypertension, which would be exacerbated by this “type of stress.” She states that [REDACTED]’s father requires his help because his father is 83 years old and recently suffered from a stroke. [REDACTED] maintains that the upheaval of moving to another country would be extremely traumatic to [REDACTED] and would constitute extreme hardship.

Upon review of [REDACTED] evaluation, the AAO finds that the applicant has failed to demonstrate that her husband would suffer extreme hardship if her waiver of inadmissibility was denied. [REDACTED] indicates in her evaluation that if [REDACTED] were asked to leave the United States with the applicant he would lose his career status. [REDACTED] indicates that [REDACTED] suffers from hypertension that would be exacerbated by the applicant’s departure from the United States. [REDACTED] indicates that [REDACTED]’s father requires his help because his father is 83 years old and recently suffered from a stroke. Although these factors may demonstrate hardship, the record does not show any documentary evidence to corroborate [REDACTED]’s assertions. 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)). Relevant documentation in this case would include: [REDACTED] earnings statement, position description, and other information pertaining to his employment; [REDACTED] medical records showing his diagnosis and treatment for hypertension; and any pertinent records for [REDACTED] father, such as, his medical records and information on his current place of residence.

Additionally, there is no information on whether [REDACTED] would suffer extreme hardship if he remained in the United States without the applicant. [REDACTED] asserts in her evaluation that [REDACTED] scored the highest category of severe on the Beck Depression Inventory and the Burns Anxiety Inventory. However, her evaluation focuses only on the ramifications of [REDACTED] departure from the United States. The evaluation does not explore the extreme hardship [REDACTED] would suffer if he remained in the United States without the applicant. Moreover, the applicant has not provided any evidence that would demonstrate a basis upon which [REDACTED] would suffer extreme hardship if he remained in the United States. Extreme hardship means more than the existence of mere hardship caused by family separation. *See Matter of Shaughnessy*, 12 I&N Dec. 810,

813 (BIA 1968)(citing *Matter of W-*, 9 I&N Dec. 1 (BIA 1960.)). Extreme hardship will not be found absent a showing of significant actual or potential injury. *Hassan v. INS*, 927 F.2d 465, 468. In this case, the record fails to establish that _____ would suffer any hardship beyond that which is normally expected upon the removal of a family member, if the applicant were denied admission to the United States. 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.

In proceedings for an 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. Here, the applicant has not met his burden. Accordingly, the appeal will be dismissed.

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