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



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

[REDACTED]

FILE:

[REDACTED]

Office: MIAMI, FLORIDA

Date:

APR 01 2009

Relates)

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. section 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica. She was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude (CIMT). The applicant is the daughter of a U.S. citizen and mother of six U.S. citizen children. The applicant 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.

The District Director concluded that the applicant had failed to establish that the bar to her admission would impose an extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on October 24, 2006.

On appeal, counsel asserts that the district director abused her discretion in denying the waiver and that the applicant has established extreme hardship.

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.

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

(h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . 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 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 . . .

To qualify as a crime involving moral turpitude for purposes of the Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). A statute under which an applicant has been convicted must be evaluated for the realistic probability that it could be applied to reach conduct that does not constitute moral turpitude. *Id.* at 698, (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). If the statute has not been applied in such a manner, it is reasonable to conclude that all convictions under the statute may be categorized as crimes involving moral turpitude. *Id.* at 697. In the

event that the statute has been applied to conduct that does not involve moral turpitude, U.S. Citizenship and Immigration Services (USCIS) may then rely on an examination of the record of conviction to determine if the applicant's conduct involved a crime of moral turpitude. *Id.* at 698. If the record of conviction does not clearly establish conduct involving moral turpitude, USCIS may then examine any additional evidence deemed necessary to determine the nature of the conduct involved. *Id.* at 698. In all such inquiries, the burden is on the alien to establish "clearly and beyond doubt" that, despite a conviction under the statute in question, his or her conduct did not involve moral turpitude. *Matter of Cristoval Silva-Trevino*, 24 I&N Dec. 687, at 709 (A.G. 2008)(citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008)).

In the present case, the record reflects that the applicant pled guilty on October 20, 1999 to grand theft under sections 812.014(1)(a) and (b), and (2)(c)1 of the 1999 Florida Statutes in the Circuit Court of the 17th Judicial Circuit in Broward County, State of Florida, and was sentenced to four years probation. The record also reflects that the applicant again pled guilty on November 30, 1999 to grand theft under section 812.014(1)(a) and (b),and (2)(c)1 of the 1999 Florida Statutes in the Circuit Court of the 17th Judicial Circuit in Broward County, State of Florida, and was sentenced to four years probation.

At the time of the applicant's conviction, Florida Statutes §§ 812.014(1)(a) and (b), and (2)(c)(1) provided, in pertinent part:

(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) Appropriately 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:

(1) Valued at \$300 or more, but less than \$5,000. .

In order for a theft offense to constitute a crime involving moral turpitude, the conduct must involve an intent to permanently take another person's property. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). The AAO notes that an examination of the statute under which the applicant was convicted, section 812.014 of Florida Statutes 1999, involves conduct that could temporarily or permanently deprive another person of their property, and is thus divisible. As convictions under this statute are not categorically considered CIMTs, it is necessary to examine the record of conviction to determine the nature of the applicant's conviction. The only item from the record of conviction contained in this record of proceeding is a May 19, 2005, copy of the Circuit Court Disposition Order for Broward County concerning the applicant's Grand Theft conviction, which does not make clear the nature of the applicant's conviction under the statute. Thus, it is necessary to review the Offense Incident Reports which are contained in this record, and which make clear that the applicant was involved in the theft of

retail items. In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a retail theft statute reasonably allowed for the presumption that the conduct involved an intent to permanently deprive the owner of their property. Therefore the applicant's conviction for theft, involving retail merchandise, constitutes a CIMT. The applicant does not contest this finding.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant is not directly relevant to the determination of extreme hardship under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's U.S. citizen spouse is the only qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(a)(9)(B)(v) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

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 applicant 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.

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.

Matter of O-J-O, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she relocates with the applicant or remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record of proceeding contains the following relevant evidence: Counsel's brief; a statement from the applicant asserting that she has made mistakes, and that if she were excluded her children would end up in "the system" in Jamaica, and birth certificates for the applicant's six children indicating that they are U.S. citizens. The entire record was reviewed and all relevant evidence considered in rendering this decision.

The AAO notes that although the applicant's mother, a U.S. citizen, is a qualifying relative for the purposes of a 212(h) waiver proceeding, the record does not address the hardship she would experience as a result of her daughter's inadmissibility, but focuses solely on the hardship that would be experienced by the applicant's children. Accordingly, the AAO finds that the record does not establish that the denial of the applicant's waiver application would result in extreme hardship to her mother, either upon her relocation to Jamaica or if she continues to reside in the United States.

The AAO now turns to a consideration of the hardship that the applicant claims would be experienced by her children if she is removed from the United States.

On appeal, counsel asserts that the applicant is the sole support for her six children; that the applicant has no ties, no family and no property in Jamaica; and that the applicant's children would become wards of the Jamaican state, be sent to an orphanage or similar facility and be subjected to sexual abuse if returned to Jamaica. The applicant asserts that she cannot return to the life she had in Jamaica and cannot subject her children to that either. While the AAO notes the claims made by counsel and the applicant concerning hardship to the applicant's children upon relocation to Jamaica, it does not find them to be supported by the record. Neither counsel nor the applicant has submitted documentary evidence to demonstrate that her children, upon relocation to Jamaica, would be made wards of the Jamaican government, placed in an orphanage or subjected to sexual abuse. Further, although counsel contends the applicant has no family in Jamaica, the applicant's Form G-325, Biographic Information, indicates that her father resides in Westmoreland, Jamaica. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the record does not establish that the applicant's children would experience extreme hardship if they moved to Jamaica with the applicant.

Counsel also contends that the applicant's children would suffer hardship if they remained in the United States without their mother, as she is their only caregiver. He further asserts that the father of two of the applicant's children is now under house arrest for battery on the applicant and has not supported his children for several months. The applicant states that if she is removed, her children will be placed in "the system" because they have no one else to look after them.

The AAO acknowledges that the applicant is the mother of six children ranging from 4 to 17 years of age. While it notes no evidence establishes that all six children reside with their mother, two of the applicant's children were listed by the applicant's mother as dependents on a 2004 federal tax return and the record indicates that the applicant and her mother have resided at the same address since 1995. Taking into consideration that the applicant has never married, that all of her children were born out of wedlock and that in only two instances do their birth records identify a biological father, the AAO finds that losing the applicant, the only parent that the record establishes they share, would constitute an extreme emotional hardship for the applicant's children. Therefore, the AAO finds the applicant to have established extreme hardship to her children if they remained in the United States following her removal.

Although the AAO has determined that the applicant's children might suffer extreme hardship if they remained in the United States following her removal, it is noted that extreme hardship to a qualifying relative or relatives must be established whether they relocate with the applicant or remain in the United

States. In this case, the applicant has failed to establish that the impact on her mother or six children would rise to the level of extreme if they were to relocate with her to Jamaica. As such, the applicant has failed to establish that her exclusion from the United States would result in an extreme hardship on a qualifying relative or relatives.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. Here, the applicant has/has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.