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FILE: Office: CALIFORNIA SERVICE CENTER Date: **AUG 03 2009**

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.

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 or reopen, 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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Argentina 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 committed crimes involving moral turpitude. 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 with her U.S. citizen spouse.

In his decision, dated August 16, 2006, the director concluded that the applicant had failed to establish that extreme hardship would be imposed on her U.S. citizen spouse and denied the waiver application accordingly.

In the Notice of Appeal to the AAO (Form I-290B), dated September 1, 2006, counsel states that the evidence submitted by the applicant establishes that the favorable circumstances in the applicant's case outweighs the unfavorable and that the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(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 crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) 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).

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 the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703. Finally, in all such inquiries, the burden is on the alien to establish “clearly and beyond doubt” that he is “not inadmissible.” *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

The record shows that the applicant was arrested in Orange County, Florida on March 19, 1999 and charged with Petit Theft under Florida Statutes § 812.014(3)(a). The applicant pled nolo contendere to this charge on May 26, 1999. The applicant was made to pay a fine for this conviction. The applicant was arrested for a second time on December 2, 2001 in Nassau County, New York and charged with Grand Larceny under New York Penal Law (NYPL) § 155.30(1). On March 25, 2002 the applicant was convicted of Petit Larceny under NYPL § 155.25 and sentenced to three years probation, one hundred hours of community service, and was made to pay a \$100 fine.

At the time of the applicant’s conviction, Florida Statutes § 812.014(3)(a) provided, in pertinent parts:

(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.

....

(3)(a) Theft of any property not specified in subsection (2) is petit theft of the second degree and a misdemeanor of the second degree, punishable as provided in § 775.082 or §775.083.

Florida Statutes § 775.082 provides, in pertinent part:

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). The AAO notes that the statute under which the applicant was convicted is a divisible statute violated by either permanently or temporarily depriving another person of the right or benefit of that person's property.

The applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under Florida Statutes § 812.014 for conduct not involving moral turpitude. Nevertheless, in accordance with the language of *Silva-Trevino*, the AAO will review the record as part of its categorical inquiry to determine if the statute was applied to conduct not involving moral turpitude in the applicant's own criminal case. The AAO notes that the record of conviction shows that the applicant was charged with knowingly obtaining or using, or endeavoring to obtain or use jewelry or souvenir item, the property of another, to-wit, Walt Disney World or Michael Berry, but does not indicate whether this taking was temporary or permanent. However, in *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The reasoning in *Jurado* is applicable to the present case. Because the record shows that the applicant committed the offense in a retail establishment and the property stolen was that of retail merchandise (jewelry or a souvenir item), the AAO finds that the applicant's crime was retail theft. Thus, the AAO finds that the applicant's conviction for petit theft under Florida Statutes § 812.014(3)(a) constitutes a crime involving moral turpitude.

At the time of the applicant's conviction for Petit Larceny, under NYPL § 155.25, the statute provided, "[a] person is guilty of petit larceny when he steals property. Petit larceny is a class A misdemeanor." The AAO notes that at the time of the applicant's conviction New York Penal Law § 70.15 stated that a sentence for a class A misdemeanor shall not exceed one year.

NYPL § 155.05 states, in pertinent part:

- (1) A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

Under NYPL § 155.00, the term "deprive" means "(a) to withhold [property] or cause it to be withheld from [another] permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property."

As stated above, the BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). From the definitions stated above, it cannot be concluded that to steal property under NYPL § 155.25 requires intent to permanently take another person's property.

However, the applicant has not presented and the AAO is unaware of any prior case in which a conviction has been obtained under NYPL § 155.25 for conduct not involving moral turpitude. The entire record was reviewed and found inconclusive as to whether the applicant's conviction involved moral turpitude. Thus, pursuant to *Matter of Silva-Trevino*, the AAO must find that the applicant's conviction under NYPL § 155.25 constitutes a crime involving moral turpitude.

Therefore, the applicant is inadmissible under 212(a)(2)(A) of the Act for having committed two crimes involving moral turpitude. The applicant has not disputed her inadmissibility on appeal.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . 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 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

The AAO notes that 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. In this case, the relative that qualifies is the applicant's spouse. Hardship to the applicant is not considered under the statute unless it is shown that hardship to the applicant will result in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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 BIA added that not all of the

foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

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 in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, “the most important single hardship factor may be the separation of the alien from family living in the United States”, and that, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” (Citations omitted). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that 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). 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 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. Moreover, the U.S. Supreme Court 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.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he accompanies the applicant to Argentina and in the event that he 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 hardship in the applicant’s case includes two affidavits from the applicant’s spouse and a brief from counsel.

In a brief, dated October 10, 2006, counsel states that the applicant and her spouse were planning to move to California to buy a home, but had to put their plans on hold because of the applicant’s immigration status. She states that the applicant contributes to the household income and the applicant’s spouse would not be able to afford the home in California without her. Counsel also states that the applicant’s situation is depressing for the applicant and her spouse because they planned to spend their lives together and now are not able to move forward with their lives. Finally, counsel states that the favorable factors in the applicant’s case outweigh the unfavorable factors.

In an affidavit from the applicant's spouse, dated June 16, 2005, he states that if the applicant were forced to leave the United States he would return to Argentina with her. He states that if he stayed in the United States without the applicant he would suffer because he would be separated from the woman he loves and the woman that cares for him everyday. He states that he feels he would suffer if he relocated because he would have to leave the United States and live in a foreign country where he does not have any friends or relatives. He states that he would not be able to work in Argentina because he does not speak the language fluently and does not have any work experience there. The AAO notes that no country condition information was submitted to support these claims.

In a second affidavit, dated May 9, 2006, the applicant's spouse states that he loves the applicant with all of his heart, she is caring and supportive, and he does not know what he would do without her.

The AAO notes that the applicant has failed to submit documentation to support the claims made by the applicant's spouse. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, the record does show that the hardships claimed by the applicant's spouse, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for an application for a 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. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.