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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship and Immigration Services

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FILE:

[Redacted]

Office: BALTIMORE

Date:

AUG 1

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. § 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 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 District Director, Baltimore, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala 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 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 U.S. citizen wife.

The applicant filed his Form I-601 application for a waiver on or about January 13, 2004. The district director issued a notice of his intent to deny the applicant's application for a waiver on May 12, 2006. *The record reflects that this notice was mailed to the applicant's address of record, yet it was returned by the U.S. Postal Service as undeliverable on May 23, 2006.* On July 26, 2006 the district director denied the application, noting that the applicant failed to respond to the issues raised in the notice of intent to deny. *Decision of the District Director*, dated July 26, 2006. Based on the evidence submitted with the Form I-601 application, the district director found that the applicant failed to show that extreme hardship would be imposed on a qualifying relative. *Id.*

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) did not mail a copy of the notice of intent to deny to his office, despite the fact that he was the attorney of record. *Statement from Counsel on Form I-290B, dated August 7, 2006.* Counsel contends that he was only provided a copy of the notice of intent to deny as an attachment to the district director's decision denying the application, thus he was not afforded an opportunity to respond to the notice prior to the district director's decision. *Brief in Support of Appeal*, undated. Counsel further asserts that the applicant is not inadmissible, as he does not have a conviction that may serve as a basis for inadmissibility. *Id.* Counsel contends that the district director did not consider positive factors that weigh in the applicant's favor, or otherwise balance positive and negative factors. *Id.* Counsel states that the district director applied an erroneous standard of hardship, and failed to consider all elements of hardship to the applicant's wife in aggregate. *Id.*

Upon review, the record supports that counsel was not provided a copy of the district director's notice of intent to deny the application prior to issuance of the denial. However, as counsel now addresses the issues raised in the notice of intent to deny on appeal, the AAO will consider counsel's assertions.

The record contains a brief from counsel; reports on conditions in Guatemala; a birth record for the applicant; documentation regarding the applicant's criminal activity; tax records for the applicant; a statement from the applicant's wife; a copy of the applicant's wife's naturalization certificate; a copy of the applicant's marriage certificate, and; copies of mortgage documents. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act states 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.

...

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

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

if -

- (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -
 - (i) . . . the activities for which the alien is inadmissible *occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,*
 - (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
 - (iii) the alien has been rehabilitated; or
- (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 [now the Secretary of Homeland Security (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 101(a) of the Act provides, in pertinent part:

As used in this Act-

- (48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

The record reflects that the applicant was given probation before judgment due to a charge of "Theft: \$300 Plus Value" under the Maryland Code Annotated Article 27 section 342 for his theft of an automobile on January 21, 1994. For this offense, the applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

On appeal, counsel contends that the applicant is not inadmissible for his theft offense, as the elements of a conviction for immigration purposes are not present. *Brief in Support of Appeal* at 4-5. However, though the Maryland court indicated that its decision was "probation before judgment," the record supports that the decision constitutes a conviction for immigration purposes. As noted above, a "conviction" includes an instance "where adjudication of guilt has been withheld" when "a judge or jury has found the alien guilty or the alien has . . . admitted sufficient facts to warrant a finding of guilt" and "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." Section 101(a)(48)(A) of the Act. In the present matter, the court withheld adjudication, yet ordered a form of punishment in the form of probation. As probation constitutes terms that represent a restraint on the applicant's liberty, it is evident that the court found that the applicant engaged in culpable conduct. Had the court determined that the applicant did not engage in the offense charged it would not have imposed punishment. Thus, the AAO finds that the record shows by a preponderance of the evidence that the court had sufficient facts to warrant a finding of guilt despite the fact that judgment was withheld. Accordingly, the order of probation before judgment regarding the applicant's theft charge constitutes a conviction under section 101(a)(48)(A) of the Act.

The record reflects that the applicant committed a permanent taking of property which constitutes a crime involving moral turpitude. *See Matter of M-*, 2 I&N Dec. 686 (BIA 1946); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). As the applicant faced a possible sentence of 15 years of incarceration for his theft offense under Maryland Code Annotated Article 27 section 342, he is not eligible for the "petty offense exception" found in section 212(a)(2)(A)(ii) of the Act. Thus, the applicant was properly deemed inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant further pled guilty to leaving the scene of an accident with an injury for his conduct on or about October 22, 1994, for which he was sentenced to attend D.U.I. school, attend a victim

impact panel, a one year suspension of his driver's license, 50 hours of community service, and to pay court costs and \$2000 restitution to the victim. The law under which the applicant was convicted does not clearly criminalize conduct that involves moral turpitude. The applicant has not submitted sufficient explanation or evidence to show the precise conduct for which he was convicted, yet the record suggests that he caused an automobile accident while driving intoxicated which resulted in injury to another individual, then unlawfully left the scene of the accident. As the applicant has not shown whether this conviction constitutes a crime involving moral turpitude, the AAO is unable to conclude whether it gives rise to further inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Yet, as the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for theft, he still requires a waiver of inadmissibility.

The record further shows that the applicant was charged with concealing a deadly weapon and possessing a deadly weapon on school property in 2001 for which a court entered a verdict of "STET," thus the applicant was not tried or found guilty of these two charges, yet the court could continue prosecution proceedings without further charges if the applicant violated an order to stay away from William Wirt Middle School. The applicant has not submitted sufficient evidence to show whether he honored the terms of the order, or whether a court resumed proceedings against him. However, the AAO finds support that weapons possession convictions do not constitute crimes involving moral turpitude where the statute in question does not include an intent to use element or other aggravating circumstances. *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979); *but see Matter of S*, 8 I&N Dec. 344 (BIA 1959). Thus, the applicant's two charges for concealing a deadly weapon and possessing a deadly weapon on school property do not give rise to further inadmissibility.

In examining whether the applicant is eligible for a waiver, the AAO will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The applicant's conviction for leaving the scene of an accident with an injury involved his conduct on or about October 22, 1994, less than 15 years ago. As the applicant has not provided sufficient evidence to show whether this crime constitutes a crime involving moral turpitude, he has not established that his crime or crimes involving moral turpitude occurred over 15 years ago such he may be considered under section 212(h)(1)(A) of the Act.

The applicant's conviction for theft involved his conduct on January 21, 1994, over 15 years ago. If the applicant had shown that this was his only crime involving moral turpitude, he would have been eligible for consideration under section 212(h)(1)(A) of the Act. Yet, the AAO notes that the applicant has not shown that he satisfies section 212(h)(1)(A)(iii) of the Act, as he has not shown that he has been rehabilitated. Specifically, as discussed above the applicant was charged with concealing a deadly weapon and possessing a deadly weapon on the property of a middle school in 2001. A judge ordered the applicant to stay away from William Wirt Middle School due to his conduct. Thus, the record does not show that the applicant has ceased from engaging in unlawful activity for a period of time that reflects that he has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant requires a waiver of inadmissibility under section 212(h)(1)(B) of the Act. Section 212(h)(1)(B) 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. Hardship the applicant experiences due to his inadmissibility is not a basis for a waiver under section 212(h) of the Act; the only relevant hardship in the present case is hardship suffered by the applicant's U.S. citizen wife. *Id.* If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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.

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).

On appeal, counsel asserts that, should the present waiver application be denied, the applicant and his wife would face the dilemma of living apart and potentially dissolving their marriage or having the applicant's wife move to a poor country. *Brief in Support of Appeal* at 11. Counsel states that the applicant's wife would bear economic consequences such as maintaining a household and paying a mortgage in the United States or the financial impact of relocating to Guatemala. *Id.* Counsel asserts that the applicant's wife has no ties to Guatemala where there is poverty, high unemployment, poor education, a lack of decent health care, and a high degree of violence. *Id.* at 11, 13.

The applicant's wife stated that she is a native of Mexico and naturalized U.S. citizen. *Statement from the Applicant's Wife*, dated December 30, 2003. She provided that she and the applicant were married on November 22, 2000 and they own the home in which they reside. *Id.* at 1. She explained that she will face significant hardship whether she relocates to Guatemala or remains in the United States without the applicant. *Id.* She asserted that she would face "abject poverty and misery" in Guatemala with no contacts or employment opportunities there. *Id.* She stated that it would be impossible for her to get a job in Guatemala. *Id.* She indicated that she would have to abandon her job, immediate relatives, friends, and church should she relocate abroad. *Id.*

The applicant's wife asserted that she will face emotional, financial, and social consequences should she remain in the United States without the applicant. *Id.* She expressed that she would face significant emotional hardship if she is deprived of the applicant's companionship and intimacy. *Id.* She stated that they would have to forego their plans to have children. *Id.* She asserted that she would face economic hardship if she had to pay their mortgage and household expenses alone. *Id.* She speculated that the applicant would be unable to find suitable employment in Guatemala, thus she would have to

support him. *Id.* She indicated that she would have to live alone and lose the applicant's presence in daily activities. *Id.*

Upon review, the applicant has not shown that his wife will suffer extreme hardship should he be prohibited from remaining in the United States. The applicant has not shown that his wife will experience extreme hardship should she relocate to Guatemala to maintain family unity. The applicant's wife expressed that she would endure emotional hardship should she be separated from her immediate relatives, friends, and church. Yet, the applicant has not shown that his wife would face unusual circumstances in this regard, or otherwise distinguished his wife's consequences due to separation from her community in the United States from those commonly experienced by those who relocate due to inadmissibility.

U.S. court decisions have 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, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS*, *supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

Counsel and the applicant's wife contend that the applicant's wife will encounter economic challenges and other hardships should she relocate to Guatemala. The AAO has examined carefully the reports submitted by the applicant on conditions in Guatemala. It is noted that the reports that reflect difficult economic conditions in Guatemala discuss conditions there in 2002 or earlier, thus they are of limited use in describing present conditions in the country. Yet, the AAO acknowledges that poverty is common in Guatemala, and that the applicant's wife would face challenges in securing employment that is comparable to that available in the United States. Yet, the applicant has not submitted sufficient explanation or documentation to show that he and his wife would be unable to find employment that meets their needs. The applicant has not stated his and his wife's estimated expenses in Guatemala or indicated whether he has contacts in Guatemala who may assist them in obtaining employment. Nor has the applicant indicated his or his wife's vocational skills such that the AAO can assess whether they have ready access to employment in Guatemala. As the applicant's wife is a native of Mexico, it is assumed that she speaks Spanish, thus she would not face a language barrier that may impact her access to employment. Thus, while it is evident that the applicant's wife would endure economic challenges, the applicant has not shown that she would face poverty or extreme financial deprivation.

The applicant provided reports that reflect that violence against women was a concern in Guatemala between 2001 and 2006. While these reports are troubling, the applicant or counsel have not discussed the reports such to show that the applicant's wife would be subject to such violence. The

record does not show that all women residing in Guatemala face such a high risk of violence that they face extreme hardship.

The applicant submitted a report that shows that medical care is lacking in Guatemala. However, the applicant has not established that his wife requires services that are unavailable to her in Guatemala, or shown that all individuals in Guatemala face health consequences that constitute extreme hardship.

The AAO has considered the elements of hardship to the applicant's wife in aggregate should she relocate to Guatemala. Based on the foregoing, the applicant has not sufficiently distinguished his wife's hardship from that which is commonly experiencing when spouses relocate abroad due to inadmissibility. Thus the applicant has not shown that his wife would experience extreme hardship in Guatemala.

The applicant has not shown that his wife would experience extreme hardship should she remain in the United States without the applicant. The applicant's wife indicated that she does not wish to reside apart from the applicant. The AAO acknowledges that the separation of spouses often results in significant emotional hardship. Yet, the applicant has not presented evidence to show unusual emotional consequences to his wife should she remain in the United States.

The applicant's wife expressed that she would face economic hardship without the applicant's assistance, including the need to meet her household expenses alone. Yet, the applicant has not stated his wife's likely economic needs such that the AAO can assess whether she would experience a shortfall. The latest income data the applicant submitted for himself and his wife consists of tax records for 2001, thus the AAO lacks more recent income information to determine the applicant's wife's circumstances.

Considering the stated hardships to the applicant's wife in aggregate, should she remain in the United States, the record does not show that she would encounter unusual difficulty that distinguishes her challenges from those ordinarily expected when spouses live apart. Thus, the applicant has not established that his wife will experience extreme hardship should she remain in the United States without the applicant.

Based on the foregoing, the applicant has not shown that denial of the present waiver application would result in extreme hardship to his wife. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion such as balancing positive and negative factors.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility 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.