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

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

JUN 19 2009

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act (INA), 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, a native and citizen of Cuba, 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 crimes involving moral turpitude. The record indicates that the applicant has two U.S. citizen children. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his children in the United States.

The director found that the applicant failed to establish that extreme hardship would be imposed on a *qualifying relative* as a result of his inadmissibility and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Director's Decision*, dated September 9, 2008.

On appeal, counsel asserts that the director failed to properly consider all the factors in the applicant's case. *Attachment to Notice of Appeal (Form I-290B)*, dated October 8, 2008. Counsel also asserts that in not giving the applicant an interview in regards to his application for permanent residence, the Director violated his right to due process. Because constitutional issues are not within the appellate jurisdiction of the AAO, this assertion will not be addressed in the present decision.

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 indicates that on November 6, 1994 the applicant was arrested for Shoplifting under Arizona Revised Statutes § 13-1805(A)(5). He was found guilty on August 8, 1995. On June 27, 1996 the applicant was arrested for Assault under Arizona Revised Statutes § 13-1203(A)(3) and on December 19, 1997 the applicant was arrested for Assault under Arizona Revised Statutes §§ 13-1203(A)(1) and 13-1202. The applicant pled guilty to the charges stemming from the arrest on December 19, 1997 on July 26, 1999 and was sentenced to 58 days in jail and 3 years probation. Finally, on May 30, 1999 the applicant was arrested and on July 19, 1999 plead guilty to one count of Aggravated Assault under Arizona Revised Statutes 13-1203 and 13-1204, designated as a Class 6 felony.

Arizona Revised Statutes § 13-1805 states, in pertinent part, that:

A. A person commits shoplifting if, while in an establishment in which merchandise is displayed for sale, the person knowingly obtains such goods of another with the intent to deprive that person of such goods by

...

5. Concealment.

The Board of Immigration Appeals (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.”). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA 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. Based on the evidence in the record, the AAO finds that the applicant’s crime was retail theft. He was thus convicted of knowingly taking goods of another with the intent to permanently deprive that person of such goods, a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Thus, the AAO finds that the applicant’s conviction for shoplifting under Arizona Revised Statutes 13-1805(A)(5) constitutes a crime involving moral turpitude

Arizona Revised Statutes § 13- 1203 states, in pertinent part, that:

A. A person commits assault by:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
3. Knowingly touching another person with the intent to injure, insult or provoke such person.

Arizona Revised Statutes § 13-1204 states, in pertinent part, that:

A. A person commits aggravated assault if the person commits assault as prescribed by section 13-1203 under any of the following circumstances:

4. If the person commits the assault while the victim is bound or otherwise physically restrained or while the victim's capacity to resist is substantially impaired.
5. If the person commits the assault after entering the private home of another with the intent to commit the assault.
6. If the person is eighteen years of age or older and commits the assault on a child who is fifteen years of age or under.
7. If the person commits assault as prescribed by section 13-1203, subsection A, paragraph 1 or 3 and the person is in violation of an order of protection...
8. If the person commits the assault knowing or having reason to know that the victim is any of the following:
 - (a) A peace officer...
 - (b) A constable...
 - (c) A firefighter, fire investigator, fire inspector, emergency medical technician or paramedic engaged in the execution of any official duties...
 - (d) A teacher or other person employed by any school and the teacher or other employee is on the grounds of a school or grounds adjacent to the school or is in any part of a building or vehicle used for school purposes, any teacher or school nurse visiting a private home in the course of the teacher's or nurse's professional duties or any teacher engaged in any authorized and organized classroom activity held on other than school grounds.
 - (e) A health care practitioner...
 - (f) A prosecutor.
9. If the person knowingly takes or attempts to exercise control over any of the following:

(c) Any implement that is being used by a peace officer or other officer or that the officer is attempting to use, and the person knows or has reason to know that the victim is a peace officer or other officer...

B. ... Aggravated assault pursuant to subsection A, paragraph 4, 5, 6, 7 or 8 or paragraph 9, subdivision (c) of this section is a class 6 felony.

The AAO notes that the statutes under which the applicant was convicted encompass acts that involve moral turpitude and acts that do not. The AAO has reviewed the entire record but finds it inconclusive as to whether the acts committed by the applicant resulting in the aforementioned convictions involved moral turpitude. Absent evidence that a prior case or prior cases, including the applicant's own case, exist in which Arizona Revised Statutes §§ 13-1203 and 13-1204 have been applied to conduct not involving moral turpitude, the AAO must determine that the applicant's convictions for assault and aggravated assault are categorically crimes involving moral turpitude. *Silva-Trevino, supra*, at 697. The AAO also notes that the applicant has not contested the designation of these criminal convictions as crimes involving moral turpitude.

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) . . . if

(1) (A) . . . it is established to the satisfaction of the Attorney General 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

(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 . . .

The record indicates that the applicant is statutorily ineligible for a waiver pursuant to section 212(h)(1)(A) of the Act. He is, however, eligible to apply for a waiver of inadmissibility pursuant to section 212(h)(1)(B) of the Act.

A section 212(h)(1)(B) waiver of inadmissibility 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, parent or child of the applicant. Hardship to the applicant is not considered in section 212(h) waiver proceedings and will be considered only insofar as it is established that hardship to the applicant is causing hardship to a qualifying relative in the application. If extreme hardship to a qualifying relative is established, in this case the applicant’s U.S. citizen children, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act; *see also Matter of Mendez-Moralez*, 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 BIA 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).

This matter arises within the jurisdiction of the Ninth Circuit Court of Appeals. That court has stated, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[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.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted). In *Salcido*, the court remanded to the Board of Immigration Appeals (BIA) for failure to consider the factor of separation despite respondent’s testimony that if she were deported her U.S. citizen children would remain in the United States in the care of her mother and spouse. *See also Babai v. INS*, 985 F.2d 252 (6th Cir. 1993) (failure to consider hardship to U.S. citizen child if he remained in the United States is reversible error).

Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

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 or she accompanies the applicant and resides in Cuba and in the event that he or she 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.

Counsel states that the applicant's children will suffer extreme hardship if they are separated from the applicant. Counsel states that the applicant is employed in the construction business and earns approximately \$50,000 per year. The record includes a letter from the applicant's employer, Younger Brothers Door and Trim, dated March 30, 2008, verifying his employment with the company. Counsel states that without the applicant contributing to the family income, his two children would be forced to live at poverty levels. Counsel also states that the applicant owns a home in the United States. *Id.* The record includes a Deed of Trust for a single-family home in Arizona under the applicant's name. In an affidavit submitted by the applicant, the applicant states that the mother of his children, who he is in a relationship with, but is not married to, has no legal status in the United States and is a citizen of Mexico. *Applicant's Affidavit*, dated April 17, 2008. He states that he provides eighty percent of the income for his household. *Id.* The record also contains copies of 2006 and 2007 joint tax returns filed by the applicant and the mother of his children showing the family income as approximately \$50,000 per year.

In his brief, counsel also asserts that if the applicant is removed to Cuba, he will have no other means of immigrating to the United States to be with his family and he will suffer under the Castro regime. *Counsel's Brief*, dated May 21, 2008. The applicant states that he attempted to flee Cuba seven times before he was successful and that he spent several months in prison as a result of these unsuccessful attempts. *Applicant's Affidavit*, dated April 17, 2008. He states that during his last arrest his father posted bond for his release and soon after he made his successful attempt at fleeing Cuba. The applicant states that if he is removed to Cuba he fears he will be imprisoned for leaving Cuba without permission, leaving Cuba while released on bond, and for anti-communist views. He states that if he is removed from the United States he will most likely never see his children again. *Id.* In support of these assertions regarding country conditions in Cuba, counsel submits various articles and reports including two reports that substantiate the claim that Cuba criminalizes unauthorized attempts to leave the island as "illegal exits" with sentences of one to three years in prison. *See Exhibit K, 1999 Human Rights Watch Report, "Cuba's Repressive Machinery: Cuba's International Human Rights Obligations;"* and *The Cuba Center for a Free Cuba, "Inside Cuba/Laws and Consequences,"* printed on May 21, 2008.

The AAO finds that separating the applicant from his children leaves his children in a vulnerable situation. The record indicates that the mother of the applicant's children has no legal status in the United States and thus could be removed at any time, the applicant is the primary income earner for the family and the applicant owns the home the children live in. Removing the applicant from the United States would mean that the applicant's children, ages 6 and 5, would lose their primary means of financial support and, potentially, their home. The record also indicates that the applicant has no other

family in the United States, with only a sister living in Cuba. Given the country conditions in Cuba and the events surrounding the applicant's departure from that country, the AAO finds it unlikely that the applicant will be able to continue providing meaningful financial support to his children from there. Thus, the AAO finds that the applicant's children would suffer extreme hardship as a result of being separated from the applicant.

Counsel also states that the applicant's situation presents a special case of extreme hardship because the applicant's two children cannot travel to Cuba to visit their father without a specific license to do so from the Office of Foreign Assets Control (OFAC). *Counsel's Brief*, dated May 21, 2008. Counsel states that even with the license from the OFAC, the children's visits with their father would be restricted in length of stay, number of visits permitted in a given time period, and the amount of money that could be spent while there. *Id.* To support these assertions counsel submits a print-out from the U.S. State Department website, dated March 31, 2008 outlining the licensing process for travel to Cuba. The AAO notes that the current travel restrictions allow for travel once a year to Cuba to visit close relatives. The AAO also notes that even if applicant's children could relocate to and reside in Cuba, they would likely face significant penalties upon attempting to re-enter the United States. In addition to the issues surrounding the children's travel to Cuba and the travel restrictions imposed on U.S. citizens, the Cuban government's possible treatment of the applicant upon his return to Cuba is of concern. As stated above and supported by the record, it is reasonable to believe that the applicant will face imprisonment for his illegal exit from Cuba, thus placing his children in a situation in which they are in a foreign country without a family member or other known individual to care for them. Thus, the AAO also finds that the applicant's children would experience extreme hardship as a result of relocating to Cuba to be with the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States, which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. “ *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant’s criminal convictions. However, the record contains evidence of rehabilitation in the applicant’s case. The record contains a “Family Impact Statement” from [REDACTED], a Licensed Professional Counselor at Healing Souls Counseling in Gilbert, Arizona. [REDACTED] states that the applicant was referred to her office for assistance and guidance with anxiety and stress that he and his family have been experiencing and that her evaluation is based on three meetings that she had with the family. *Family Impact Statement*, dated April 5, 2008. She states that these meetings occurred on May 18, 2007, May 31, 2007, and April 4, 2008. *Id.* [REDACTED] states that in these meetings the applicant discussed openly, honestly and with remorse the violent behavior in his past. *Id.* She states that the applicant seems to take full responsibility for his actions and learned from each experience. *Id.* In his affidavit, the applicant expresses remorse and asks for forgiveness for his past actions. *Applicant’s Affidavit*, dated April 17, 2008. In addition, the applicant’s employer states that the applicant is a loyal and trustworthy employee, has exceptional work habits, and is a loving father. *Letter from Employer*, dated March 30, 2008.

The AAO finds that the favorable factors in the present case are extreme hardship to the applicant’s U.S. citizen children if he is denied a waiver of inadmissibility; the applicant’s consistent record of employment, payment of taxes and financial support of his family; the applicant’s lack of a criminal record or offense since 1999; and the applicant’s rehabilitation for his past misconduct.

The AAO finds that the crimes committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.