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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



H2

FILE: [REDACTED] Office: CHICAGO, ILLINOIS

Date: JUN 26 2009

IN RE: [REDACTED]

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.

A handwritten signature in black ink that reads "John F. Grissom".

John F. Grissom  
Acting Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Mexico 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 reside with her legal permanent resident husband and children in the United States.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated September 19, 2006.

On appeal, counsel contends that the applicant is not inadmissible as she has not been convicted of any crime involving moral turpitude. Specifically, counsel asserts the applicant's 1996 arrest for retail theft was merely a violation of a local ordinance and not a "conviction" under the Act. In addition, counsel asserts the applicant's 1998 domestic battery conviction was not a crime involving moral turpitude. Counsel alternatively claims that even if the applicant is inadmissible, the district director erred in not finding extreme hardship to a qualifying relative.

The record contains, *inter alia*: a copy of the marriage license of the applicant and her husband, indicating they were married on May 11, 1994; affidavits from the applicant, her husband, and their two U.S. citizen sons; medical documents; financial and tax documents; conviction documents; letters of support; photos of the applicant and his family; school records; and an approved Immigrant Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection . . . 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 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 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.” *Id.* 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. *Id.* 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.’ 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 (internal citation omitted). 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 (8<sup>th</sup> Cir. 2008)).

In the instant case, the applicant contends she entered the United States in 1995 without inspection. The record also shows that on January 5, 1996, the applicant was arrested for “RET THEFT/DISPLAY MERCH/>\$150.” *Charge, Disp, and Sentences Query, Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois.* On January 22, 1996, after a bench trial, the applicant was found guilty, fined, and granted conditional discharge. *Id.* The record also shows that on August 31, 1998, the applicant pled guilty to domestic battery in violation of section 5/12-3.2(a)(1) of the Illinois Criminal Code of 1961. The applicant was fined and granted conditional discharge. *Order and Certificate of Misdemeanor Probation/Conditional Discharge/Supervised Supervision*, dated August 31, 1998. *Id.*

Beginning with the applicant’s domestic battery conviction, section 5/12-3.2(a)(1) of the Illinois Criminal Code of 1961 states:

(a) A person commits domestic battery if he intentionally or knowingly without legal justification by any means:

(1) Causes bodily harm to any family or household member as defined in subsection (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, as amended. . . .

720 ILCS 5/12-3.2(a)(1). In accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which the criminal statute under which the applicant was convicted did not involve moral turpitude. The AAO is aware of one at least such case. *See People v. Roberts*, 286 Ill.Dec. 524 (2004) (reversing a conviction for domestic battery under 720 ILCS 5/12-3.2 because a parent is legally justified in using reasonable force when necessary as part of reasonable discipline of a child and the jury should have been so instructed); *see also In re Sanudo*, 23 I. & N. Dec. 968 (BIA 2006) (battery conviction under California law, even when the battery was inflicted upon a spouse, does not inhere moral turpitude because a conviction need only involve a minimal, nonviolent touching); *People v. Pickens*, 354 Ill.App.3d 904, 911-12 (2004) (upholding conviction for domestic battery under 720 ILCS

5/12-3.2 because the defendant intentionally or knowingly closed a door on his wife's foot). Therefore, the AAO cannot find that the applicant's domestic battery conviction under 720 ILCS 5/12-3.2(a)(1) is categorically a crime involving moral turpitude.

Accordingly, the AAO must review the entire record, including the record of conviction and, if necessary, other relevant evidence, to determine if the applicant's conviction involved moral turpitude. The AAO notes that the documents comprising the record of conviction are inconclusive as to whether the applicant's conduct involved moral turpitude. However, the record contains affidavits from the applicant and her husband describing the incident which led to the applicant's domestic battery conviction. According to the applicant, one day in June 1998, the applicant and her husband began changing their carpet at 8:00 a.m. and did not finish until approximately 11:00 p.m. *Affidavit of* [REDACTED] dated November 16, 2006. The applicant states that she was very tired and her husband left for his late shift at work, leaving her at home with their two sons. *Id.* She states that her son, [REDACTED] who was six years old at the time, "did not want to sit, he was jumping on the sofas and did not let his little brother [REDACTED] to sleep." *Id.* The applicant "called for [REDACTED] attention three times[, but h]e did not listen," and the applicant "hit [her] son with a shoe." *Id.* The applicant states that she understands it was wrong to hit her son, that she has completed a parenting class, and has learned to control her emotions and not hit her children. *Id.*; *see also Affidavit of* [REDACTED], dated November 16, 2006 (stating that the applicant has completed counseling and has not struck the children again). Based on this evidence, and the Illinois court's recognition that a parent may use reasonable force when necessary to discipline a child, *People v. Roberts, supra*, the AAO finds that applicant's conviction for domestic battery did not inhere moral turpitude.

Turning to the applicant's 1996 arrest for retail theft, although the AAO agrees with counsel that the record does not indicate the statute under which the applicant was found guilty, counsel provides no evidence and no authority for his proposition that "[i]t appears that this case . . . likely represents an ordinance violation, not a crime in the state of Illinois." *Brief in Support of the Appeal of the Denial of an I-601 Waiver*, at 3. According to the copy of the applicable ordinances of the City of Waukegan that counsel attached to his brief, "[n]otice of any ordinance violation shall be issued" by authorized personnel and must contain information including, but not limited to: the name of the person violating the ordinance; the date, time, and place of the violation; the specific ordinance violated; the fine and any penalty which may be assessed; the signature of the person issuing the notice; and the date and location of the adjudication hearing. *Article VIII, Administrative Adjudication of Violations of City Ordinances*, at § 2-525. In addition, notice of any ordinance violation must be served upon the ordinance violator and a copy of the notice must be retained by the ordinance enforcement administrator and kept as a record in the ordinary course of business. *Id.* at § 2-526. Furthermore, "[a]n administrative hearing to adjudicate any alleged ordinance violation on its merits shall be granted . . . [and] shall be recorded." *Id.* at § 2-527. A "hearing officer shall preside over all adjudicatory hearings." *Id.* at § 2-523. In the event the person alleged to have violated an ordinance fails to appear for the administrative hearing, a notice of final determination of liability must be sent to the alleged ordinance violator. *Id.* at §§ 2-528, 2-529.

Significantly, according to the Charge, Disposition, and Sentences Query from the Circuit Court of the Nineteenth Judicial Circuit in the record, the applicant was found “guilty” following a “bench trial.” *Charge, Disp, and Sentences Query, Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois*. Indeed, the applicant states that “the police gave [her] a court hearing[, and that she] appear[ed] in front of the judge.” *Affidavit of [REDACTED] supra*. There is no mention of a hearing officer or an administrative hearing, but rather, a “bench trial,” in front of a “judge,” suggesting that the applicant was convicted of a state criminal statute, not a city ordinance. Moreover, despite the requirement that notice of an ordinance violation must be served upon the alleged violator and that a copy must be kept in the ordinary course of business by the ordinance enforcement administrator, the applicant has not provided a copy of any such notice. The applicant has similarly failed to assert that she attended an administrative hearing before a hearing officer, provide notes or a copy of a transcript of any such hearing which was required to be recorded, or provide a copy of any notice of final determination of liability. Because the burden is on the applicant to establish “clearly and beyond doubt” that she is “not inadmissible,” *Matter of Silva-Trevino*, 24 I&N Dec. at 709, the AAO is unpersuaded by counsel’s contention that the applicant merely violated a city ordinance and was not “convicted” of retail theft.

To the extent the applicant contends she “did not do it,” that it was her niece who “took a lipstick,” and that she signed a document given to her by the police because they purportedly told her she would never see her baby again, the AAO notes that the applicant does not challenge the fact that she was found guilty of theft. *Affidavit of [REDACTED] supra* (“they considered me as a accomplice and I too was to blame for the theft . . . [T]he judge . . . gave me a fine of 150 dollars and prohibited me to enter to that store for six months.”). Accordingly, the record shows that the applicant is inadmissible under section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), for having been convicted of theft, a crime involving moral turpitude. *See Briseno-Flores v. Att’y Gen. of U.S.*, 492 F.3d 226, 228 (3d Cir. 2007) (guilty plea to petty theft was a crime involving moral turpitude) (citing *Quilodran-Brau v. Holland*, 232 F.2d 183, 184 (3d Cir. 1956) (“It is well settled as a matter of law that the crime of larceny is one involving moral turpitude regardless of the value of that which is stolen”), and *Matter of Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974) (“It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude”)).

A section 212(h) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See 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. *See 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 alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include: 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. The BIA has held:

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). In addition, the Court of Appeals for the Ninth Circuit has held that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[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 (9<sup>th</sup> Cir. 1998) (citations omitted). See also *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9<sup>th</sup> Cir. 1987) (“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); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9<sup>th</sup> Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted).

In this case, the applicant’s husband, [REDACTED], states that he has never been separated from his wife since their relationship began in 1990 and that she is an “indispensable” part of the family. [REDACTED] states that he works long hours, leaving the house at 4:00 a.m. and returning after 8:00 p.m. He states his wife takes care of the entire household and their two U.S. citizen sons. [REDACTED] states that if his wife departed the United States, he would have no family who could help him because they live far away and he does not want to hire a stranger to take care of the children. In addition, [REDACTED] states that his son, [REDACTED], suffers from chronic bronchitis for which he uses an inhaler and takes a lot of medicine and antibiotics, and that his wife manages [REDACTED] health issues. Furthermore, [REDACTED] states that he himself suffers from a liver problem and hepatitis and that his wife takes care of him when he is ill. [REDACTED] also states that he does not have a house in Mexico where he can move his family. *Affidavit of [REDACTED] supra.*

The applicant states that [REDACTED] has weak lungs as a result of being born prematurely. She states that [REDACTED] has one lung that is more developed than the other lung and that he is hospitalized for chronic bronchitis for approximately one week every year. In addition, the applicant states [REDACTED] has hepatitis and needs to check his liver function every year. She claims to take care of her husband’s diet and to take her husband and her son to see the doctor when they are ill. The applicant further claims that if she is removed to Mexico, the small town where she is from, [REDACTED], has no schools or doctors nearby. *Affidavit of [REDACTED], supra.*

Both of the couple's sons submitted letters of support for their mother. [REDACTED], who is currently seventeen years old, states that he relies on his mother for everything and that he rarely sees his father because he works most of the time. [REDACTED] states that when he is in the hospital, his mother refuses to leave his side until he is better. [REDACTED] states that his mother is an enormous support to him and that he loves her very much. *Letter from [REDACTED]*, undated. [REDACTED], who is currently fourteen years old, states that if his mother departs the United States, he does not know who would take him to school, remind him to study, cook meals for him, or take care of him when he is sick. He states that without his mother, he "would be nothing." *Letter from [REDACTED]*, undated.

Upon a complete review of the record evidence, the AAO finds that the applicant has established that her son, [REDACTED], will experience extreme hardship if her waiver application is denied.

In this case, the record shows that [REDACTED] has recurrent bronchitis that has necessitated numerous doctor's visits and hospitalizations over the course of his entire life. For instance, in 1998, when [REDACTED] was six years old, the record indicates that he had bronchitis in January two separate times, February, August, October, and again in November. *B.I.O.Y.A. Corporation, Pediatric Problem List*, undated. More recently, [REDACTED] was hospitalized in December 2004 and again in May 2005 for bronchitis and pneumonia. *Patient Progress Notes*, dated January 3, 2005, and May 12, 2005. The record also contains copies of lab reports, showing that [REDACTED] has had numerous chest X-rays and throat cultures. According to [REDACTED]'s doctor, various medications help control [REDACTED] recurrent bronchitis and it is very important that the applicant remain in the United States in order to help [REDACTED] keep his recurrent bronchitis under control. *Letter from [REDACTED]* dated October 20, 2006. The record also indicates that [REDACTED] has a "hard mass in the right anterior chest wall," and requires a follow-up CT scan. *The Children's Memorial Hospital, Division of Pediatric Orthopaedic Surgery*, dated October 2, 2003. Based on [REDACTED] chronic and serious health condition and the need for his mother's assistance, the AAO finds that the denial of the applicant's waiver application would result in extreme hardship to her U.S. citizen son.

Moreover, given [REDACTED] health problems, the AAO finds that moving to Mexico with the applicant to avoid the hardship of separation would be an extreme hardship. Even assuming [REDACTED] physical health would permit him to move to Mexico, relocating to Mexico would disrupt the continuity of his health care and the procedures his doctors have in place to treat him. In addition, [REDACTED] was born in the United States and there is no indication he has ever lived in Mexico, a difficult situation made even more complicated by his recurrent bronchitis. In sum, the hardship [REDACTED] would experience if his mother were refused admission is extreme, going well beyond those hardships ordinarily associated with deportation. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that the applicant's U.S. citizen son faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse

factors in the present case are the applicant's initial entry into the United States without inspection, periods of unauthorized presence and her criminal convictions. The favorable and mitigating factors in the present case include: the applicant's family ties to the United States, including her lawful permanent resident husband and their two U.S. citizen children; the extreme hardship to the applicant's son, [REDACTED], if she were refused admission; the numerous letters of support from the applicant's children, the children's school principal and assistant principal, the applicant's pastor describing her as "honest and ha[ving] a good reputation in [the] community," *Letter from [REDACTED]* [REDACTED] dated October 11, 2006, and other friends describing the applicant as "an outstanding mother," and "tireless worker, giving all the attention to her children," *Letter from [REDACTED]*, dated October 10, 2006; the fact that the applicant and her husband own a home; and the fact that the applicant has not had any further arrests or convictions for over ten years.

The AAO finds that, although the applicant's immigration violations and criminal history are serious and cannot be condoned, when 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.