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U.S. Citizenship  
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FILE: [REDACTED] Office: PHILADELPHIA, PA Date: **APR 19 2010**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h) of the Immigration and Nationality Act.

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).

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED] is a native and citizen of Vietnam 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 sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting District Director*, dated September 9, 2006.

On appeal, counsel states that the applicant has been his mother's caretaker for six years and that her health would deteriorate if he is removed from the United States. Counsel states that the applicant's mother has: coronary artery disease, a stent implant, head trauma, facial hematoma, asthma, hypertension, hyperlipidemia, and osteoporosis. She states that the applicant was with his mother when she fell and suffered trauma to her head and a facial hematoma. Counsel asserts that the applicant and his mother and brothers have lived in the United States for many years. Counsel claims that the applicant's mother is stressed because it will be impossible for her to visit the applicant in Vietnam. Counsel contends that the applicant's mother is unable to afford all of her medication, and her hardship will worsen after the applicant's removal. She claims that the applicant's mother would experience extreme hardship if the waiver is denied.

The AAO will first address the finding of inadmissibility. Section 212(a)(2) of the Act states that:

(A)(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 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

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.

The court history reflects that on June 29, 2001, in the state of Philadelphia, the applicant pled guilty to “theft by failure to make required disposition of funds received” in violation of 18 Pa.Cons. Stat. § 3927(a), which crime is a felony. The judge sentenced him to probation for seven years, and ordered that he pay restitution.<sup>1</sup>

18 Pa.Cons. Stat. § 3927(a) (1972) provides in pertinent part:

A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the failure of the actor to make the required payment or disposition.

In determining whether theft is a crime of moral turpitude, the Board of Immigration Appeals (BIA) considers “whether there was an intention to permanently deprive the owner of his property.” *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). In *Matter of G-T-*, 4 I&N Dec. 446 (BIA 1951), the BIA held that violation of a theft-conversion law in Texas involved moral turpitude because the criminal intent to deprive an owner of his property was an essential element of the statute, and that Texas courts held that the term “conversion” connotes that the goods, obtained through a bailment contract, when appropriated by the defendant to his own use, permanently deprived the owner of their enjoyment.<sup>2</sup> *Id.* at 448.

The AAO is unaware of any published federal cases addressing whether the crime of “theft by failure to make required disposition of funds received” under Pennsylvania law is a crime of moral turpitude. However, court cases in Pennsylvania are instructive in determining whether “theft by failure to make required disposition of funds received” is a crime involving moral turpitude. In *Commonwealth v. Stein*, 401 Pa. Super. 518, 585 A.2d 1048 (1991), the court states that conviction under section 3927(a) requires proving four elements: that the defendant (1) obtained the property of another, (2) subject to an agreement or known legal obligation upon the receipt to make specific

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<sup>1</sup> The record reflects that the judge suspended the sentence of 23 months incarceration followed by five years of probation.

<sup>2</sup> Article 1429 of Vernon's Annotated Penal Code of Texas provides as follows:

*Theft-Conversion by bailee.*-Any person having possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use with intent to deprive the owner of the value of the same, shall be guilty of theft . . .

payments or other disposition thereof; that the defendant (3) intentionally dealt with the property obtained as the defendant's own; and (4) failed to make the required disposition of the property. *Id.* at 522-523 (citing *Commonwealth v. Ohle*, 503 Pa. 566, 581, 470 A.2d 61, 69 (1983)). In *Stein* the appellant was not guilty of theft by failure to make required disposition of funds received because the court found the third criminal element, which is the "intent" element, was not proven. *Id.* at 524-527. The court stated that "intent" is defined by the Pennsylvania legislature as the "*conscious object* to engage in conduct of that nature." *Id.* at 523-524. In reaching its conclusion, the evidence showed that the appellant received a salary as a salesperson with his brother's company, his job was to secure home improvement contracts and receive a deposit from homeowners, he had no control over the company's accounts, and he did not intentionally deal with the homeowners' property as his own. *Id.* at 521-522. Furthermore, the court found unpersuasive the allegation that the appellant *knew* when he sold the contracts to homeowners that his brother's company could not and would not perform the work. *Id.* at 525.

The third element of section 3927 requires proving beyond a reasonable doubt that at the *inception* of the contract a defendant did not intend to perform the contracted obligations. *See Commonwealth v. Robichow*, 338 Pa.Super. 348, 487 A.2d 1000 (1985) ("evidence establishes that from the *inception* of the subject contract, appellant intended not to perform as contractually obligated"). *Id.* at 353. *See also Commonwealth v. Bhojwani*, 242 Pa.Super. 406, 364 A.2d 335 (1976) (evidence produced led to conclusion that from the inception of the contract, defendant never intended to place the order for the clothes of his customers). *Id.* at 412-413. If it is proven that a defendant intended to perform the contract, he will not be found to have fraudulently taken the money of another. *See Commonwealth v. Austin*, 258 Pa.Super. 461, 393 A.2d 36 (1978) (appellant found not guilty of violating section 3927 where he performed the construction contract for almost two months, "and only after the economies overwhelmed him did he cease performance"). *Id.* at 467-468. The word "deals" in the context of section 3927(a) "means that the actor treated the property or funds of another, designated to be used for a specific purpose, as if it were his or her own property." *See Commonwealth v. Wood*, 432 Pa.Super. 183, 637 A.2d 1335 (1984). *Id.* at 201.

In light of the elements that must be proven for a conviction under section 3927, which elements include *scienter* and the failure to make the required disposition of funds and thereby permanently depriving the owner of his property, and in view of the holding in *In re Jurado-Delgado* and *Matter of G-T-*, which holding is that there must be an intent to permanently deprive the owner of his property, the AAO finds that "theft by failure to make required disposition of funds received," which in its essence involves fraudulent conduct and the intent to permanently deprive an owner of property, constitutes a crime involving moral turpitude.

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. 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) . . . 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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative here is the applicant's naturalized citizen mother. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship a qualifying relative pursuant to section 212(i) of the Act. 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. *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Evidence in the record includes affidavits, naturalization certificates, birth certificates, a Lawful Permanent Resident Card, medical records, and other documentation. In rendering this decision, the AAO has carefully considered all of the evidence in the record.

Extreme hardship to the applicant's mother must be established in the event that she remains in the United States without the applicant, and alternatively, if she joins the applicant to live in Vietnam. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

With regard to the hardship experienced by the applicant's mother if she remained in the United States without the applicant, the affidavits by the applicant and his mother and brothers claim the following. The applicant lives with his mother and is her care provider, taking her to appointments, cooking her meals, obtaining and administering her medication, and cleaning the house. The applicant's brother, [REDACTED] works and has his own family and therefore does not have the

time to take care of their mother. The applicant's brother, [REDACTED] lives with the applicant and their mother and financially supports them. The record reflects that the applicant's mother has health problems. The document dated July 17, 2006 by [REDACTED] states that the applicant's mother is non-English speaking and has heart disease, asthma, lipid, and osteoporosis. Her medical evaluations, dated June 14, 2006 and March 1, 2006, relay that she takes medication and is in no acute distress. The March evaluation conveys that her post stenting is stable, her hypertension and asthma are controlled, and her hyperlipidemia is treated and is to return in three months for a follow-up visit. The document dated January 15, 2006 by the Albert Einstein Healthcare Network conveys that she was diagnosed with a facial hematoma.

Family separation must be considered in determining hardship. See, e.g., *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) ("the most important single hardship factor may be the separation of the alien from family living in the United States"). However, courts have found that family separation does not conclusively establish extreme hardship. In *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), states that "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991).

The applicant has demonstrated that his mother has medical problems. He claims that he stays at home to take care of her while his brother, [REDACTED], financially supports them. However, the applicant submitted no documentation of his brother's employment such as his wage statements or income tax records or evidence of his mother's income. In the absence of such documentation, the AAO finds unpersuasive the claim that the applicant's brother is financially supporting the family while the applicant takes care of their mother. Counsel declares that the applicant's mother is unable to afford all of her medication, and her hardship will worsen after the applicant's removal. While the AAO notes that one of the medical records indicates that the applicant's mother is not purchasing certain medication because it is expensive and not covered by her insurance, this fact alone is not sufficient for the AAO to determine the financial status of the applicant's mother in the absence of documentation of her income, the income of her son, and the family's household expenses. Thus, the AAO is unable to determine whether the applicant's mother can financially afford to pay for a care provider or whether other family members will assist in her care in the applicant's absence. 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).

As shown by the record, the applicant's mother has health problems and the applicant has a close relationship with his family members. The claim that the applicant takes care of his mother while his brother works carries less weight because there is no evidence in the record of [REDACTED] employment. The applicant has not fully explained how the emotional hardship that his mother will feel when he returns to Vietnam is "unusual or beyond that which would normally be

expected” upon bar to admission to the United States. There is no documentation in the record substantiating the applicant’s mother’s concern that she will be unable to visit her son in Vietnam.

In considering all of the hardship factors presented, the AAO finds that when the factors are combined and considered collectively, they fail to demonstrate that the applicant’s mother would experience extreme hardship if she remained in the United States without him. Although the applicant has established that his mother has serious health problems, he has provided no documentation of his brother’s income, which documentation is needed to corroborate his claim that he must take care of his mother while his brother is employed. He has provided no documentation of his mother’s income and household expenses, which documentation is needed to show that she cannot afford medication or a care provider. While the AAO acknowledges that the applicant’s mother will experience emotional hardship due to their separation, he has not fully explained how his mother’s emotional hardship will be “unusual or beyond that which would normally be expected” upon bar to admission to the United States. Consequently, the combination of hardship factors, when considered collectively, fails to show that the applicant’s mother will experience extreme hardship if she remained in the United States without her son.

The applicant makes no claim of extreme hardship to his mother if she joined him to live in Vietnam.

Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under sections 212(h) of the Act.

Because the applicant is statutorily ineligible for relief, no purpose is served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.