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

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FILE:

Office: HARLINGEN, TEXAS

Date: MAR 08 2010

IN RE:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Perry Rhew  
Chief, Administrative Appeals Office

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

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 committed crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with her lawful permanent resident spouse, two children, and mother and her U.S. citizen child.

In his decision dated February 22, 2006, the district director states that hardship to the applicant's lawful resident or U.S. citizen spouse and/or parent is the only hardship that can be applied in the applicant's case. He then found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly.

In the Notice of Appeal to the Administrative Appeals Office (Form I-290B) dated March 23, 2006, counsel states that the district director's decision fails to meaningfully consider the hardship that would accrue to the applicant's spouse as a result of family separation and the suffering it would cause to the applicant's U.S. citizen son.

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.

The record shows that the applicant was arrested on March 17, 1999 and charged with Theft of Service in Harlingen, Texas under Texas Statutes § 31.04. On August 8, 2005 she pled guilty to this charge and was ordered to pay a \$550 fine. The record also shows that on September 16, 1994 the applicant was arrested for “Theft C”. There is no indication in the record of how this arrest was resolved.

At the time of the applicant’s conviction, Texas Statutes § 31.04 stated, in pertinent part:

(a) A person commits theft of service if, with intent to avoid payment for service that he knows is provided only for compensation:

- (1) he intentionally or knowingly secures performance of the service by deception, threat, or false token;
- (2) having control over the disposition of services of another to which he is not entitled, he intentionally or knowingly diverts the other's services to his own benefit or to the benefit of another not entitled to them;
- (3) having control of personal property under a written rental agreement, he holds the property beyond the expiration of the rental period without the effective consent of the owner of the property, thereby depriving the owner of the property of its use in further rentals; or
- (4) he intentionally or knowingly secures the performance of the service by agreeing to provide compensation and, after the service is rendered, fails to make payment after receiving notice demanding payment.

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). The AAO notes that Texas Statutes § 31.04 is a divisible statute where some conduct under the statute may be found to involve moral turpitude and some conduct may not.

On July 28, 2009, the AAO sent the applicant a Request for Further Evidence providing the applicant with 12 weeks to submit evidence addressing whether or not the conduct for which the applicant was convicted under Texas Statutes § 31.04 was conduct not involving moral turpitude. In response to the Request for Further Evidence the applicant, through counsel, submitted a brief, a letter from the applicant, a letter from the applicant’s child’s school, and three additional documents

concerning the applicant's criminal record. The criminal record documents do not indicate any further information about the applicant's conviction except that she was made to pay a \$550 fine as a result of the conviction in 1999. However, in her statement dated November 23, 2009, the applicant admits that she was convicted in 1994 and in 1999 for shoplifting.

In *In re Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The reasoning in *Jurado-Delgado* is applicable to the present case. Based on the applicant's admission, the AAO finds that the applicant's crime was retail theft. She 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 convictions for Theft constitute crimes involving moral turpitude.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

. . . .

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relatives that qualify are the applicant's three children, mother, and spouse. Hardship to the applicant is not considered under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

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

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant 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.

In addition to the documents submitted with the Request for Further Evidence, as stated above, the record of hardship includes a statement from the applicant’s spouse and a letter from a psychiatrist.

In her brief, counsel states that the applicant’s spouse will suffer extreme emotional and financial hardship as a result of the applicant’s inadmissibility. She states that if the applicant is removed the applicant’s son will relocate with her to Mexico because the applicant’s spouse would not be able to care for their son on his own. She states that the applicant’s son is physically and emotionally challenged, he has limited hearing, and suffers from Attention Deficit-Hyperactivity Disorder (ADHD). Counsel states that if the applicant’s son were to relocate with the applicant he would be separated from his older brothers, it would interrupt his education, and it would make it impossible for him to continue with family therapy.

In a letter dated October 20, 2009, the applicant’s son’s psychotherapist states that the applicant’s son was evaluated and found to suffer from ADHD and Oppositional-Defiant Disorder. He states

that the applicant's son is being medicated with Adderall and is starting individual and family psychotherapy. In a letter dated March 30, 2006, a psychiatrist states that the applicant's son has been his patient since February 2004, has been diagnosed with ADHD, has been prescribed Ritalin and Periactin, and that it is his recommendation that he continue under psychiatric care.

In a statement dated August 26, 2005 the applicant's spouse states that if his wife is found inadmissible the family would have to separate with the applicant and his youngest son relocating to Mexico, and he and their other two sons staying in the United States. The applicant's spouse states that his two older sons are becoming permanent residents and relocating to Mexico would jeopardize their immigration status. The applicant's spouse states further that the applicant is very loving and has always been particularly close with their youngest son and that separation would be devastating to the family.

The AAO finds that the current record indicates that the applicant's youngest son would experience extreme hardship as a result of relocating to Mexico. The applicant's son, who is now thirteen years old would suffer from being taken out of school, out of his current therapy, and then being separated from his father and brothers in the United States and the only life he has known. U.S. courts have held that "imposing on *grade school age citizen children, who have lived their entire lives in the United States*, the alternatives of either . . . separation... or removal to a country of a vastly different culture" must be considered in a determination of whether extreme hardship has been shown (*Ramos v. INS*, 695 F.2d 181, 186 (5<sup>th</sup> Cir. 1983) (emphasis added), noting that "there is, of course, a great difference between the adjustment required of . . . infants and that of grade school age children." *Id.* at 187, fn 16; *see also Matter of Kao & Lin*, 23 I & N Dec. 45 (BIA 2001) (finding extreme hardship for a 15 year old, who had lived her entire life in the United States and was completely integrated into her American lifestyle, if she were uprooted upon her parent's deportation). Therefore, the applicant's son, who is thirteen years old, is receiving treatment for mental disabilities, and has lived his entire life in the United States, would experience extreme hardship as a result of relocating to Mexico. In addition, the applicant's other qualifying relatives would experience extreme hardship as a result of being separated from their mother and wife. The applicant is the primary caretaker for her youngest son, she has two other children and her spouse living in the United States. As noted above, considerable, if not predominant, weight must be given to the hardship that will result from the separation of family members. *See Salcido-Salcido, supra*; *see also Bastidas v. INS*, 609 F.2d 101 (3rd Cir.1979), (the court explicitly stressed the importance to be given the factor of separation of parent and child). Thus, given the applicant's close family ties to the United States, in particular the applicant's relationship with her youngest child, the AAO finds that separation of the family from their mother would cause extreme hardship.

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-Moralez*, 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 convictions for Theft. The favorable factors in the present case are the applicant's family ties to the United States; hardship to her family if she were to be denied a waiver of inadmissibility; the applicant's lack of a criminal record or offense since 1999; and, as indicated by statements from the applicant's spouse, her attributes as a good mother and wife.

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.