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U.S. Citizenship and Immigration Services

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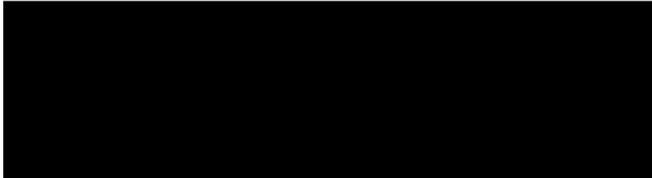
Applicant:



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.

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Oakland Park, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Peru 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 a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with her U.S. citizen daughter.

The director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative, her U.S. citizen daughter, and denied the waiver application accordingly.

On appeal, counsel asserts that the applicant's conviction for grand theft in the third degree does not constitute a crime involving moral turpitude. Counsel contends that the applicant is not subject to inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

In support of the waiver application, the record contains, but is not limited to, a statement from the applicant's daughter, financial documentation, medical documentation, and court records. The entire record has been reviewed in rendering a decision on the appeal.

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.)

The record shows that the applicant, using the name [REDACTED], was arrested in Plantation, Florida on March 1, 2002 and charged with grand theft in an amount between \$300 and \$5,000. The applicant, who was born on April 15, 1944, was 57 years old at the time she committed the crimes that resulted in her arrest.

The record shows that the applicant was convicted in the Seventeenth Judicial Circuit Court, Broward County, Florida, on March 13, 2002 of grand theft of the third degree in violation of section 812.014(2)(c)(1) of the Florida Statutes [REDACTED]. Grand theft of the third degree is a third degree felony punishable by a maximum of five years imprisonment. Fl. Stat. § 775.082(3)(d). The applicant was placed on probation for a period of 18 months.

At the time of the applicant's conviction, Fl. Stat. § 812.014(2)(c)(1) provided, in pertinent parts:

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriately the property to his or her own use or to the use of any person not entitled to the use of the property.

(2) . . .

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

(1) Valued at \$300 or more, but less than \$5,000. . . .

On appeal, counsel asserts that the applicant has been convicted under a divisible statute that includes temporary and permanent takings. Counsel states that the applicant has not been convicted

of a crime of moral turpitude because the divisible statute under which she was convicted includes temporary takings, which are not crimes of moral turpitude. Counsel states that under the modified categorical inquiry, the “Information” contained in the record of conviction charged the applicant with the intent to temporarily or permanently deprive or appropriate the property of another. Counsel states that using or obtaining property of another with intent to appropriate that property to oneself or another is conduct prohibited under the statute, but does not involve moral turpitude. Counsel states that the intent to appropriate does not require any intent to deprive another of rights and benefits of property.

In *Matter of Silva-Trevino* the Attorney General adopted the “realistic probability” standard articulated by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), as an approach for determining inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. See 24 I&N Dec. 687, 698 (2008).

The methodology articulated by the Attorney General for determining whether a conviction is a crime involving moral turpitude requires an adjudicator to review 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. at 193). 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. . . .” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

Several U.S. Courts have distinguished the realistic probability test articulated in *Duneas-Alvarez* in cases where “a state statute explicitly defines a crime more broadly than the generic definition” and “no ‘legal imagination,’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.” *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007)(citing *Duenas-Alvarez*, 127 S.Ct. at 822). In *United States v. Vidal*, the Ninth Circuit Court of Appeals determined that a “realistic probability” that the theft statute under which the alien was convicted would be applied to conduct that falls outside the generic definition of theft could be found in the plain text of the statute. 504 F.3d 1072, 1082 (9th Cir. 2007). The Ninth Circuit noted that “when ‘[t]he state statute’s greater breadth is evident from its text,’ a defendant may rely on the statutory language to establish the statute as overly inclusive.” *Id.* (citing to *United States v. Grisel*, 488 F.3d at 850.).

In the instant case, the statute under which the applicant was convicted, Fl. Stat. § 812.014, involves both temporary and permanent takings. A plain reading of Fl. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. 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.”). Therefore, the AAO cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, we will apply the modified categorical approach and engage in a second-stage

inquiry by reviewing the record of conviction to determine if the conviction was based on conduct involving moral turpitude. *Silva-Trevino* 24 I&N Dec. 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. The record of conviction in this case includes the “Information” filed by the state prosecuting attorney, which provides that the applicant was charged with the following:

██████████ on the 1st day of March, A.D. 2002, in the County and State aforesaid, did then and there unlawfully and knowingly obtain or endeavor to obtain the property of Macy’s, to-wit: merchandise, of the value of three hundred dollars (\$300.00) or more, but less than five thousand dollars (\$5,000.00), with the intent to either temporarily or permanently deprive Macy’s of the right to the property or a benefit from the property, or to appropriate the property to her own use or the use of any person not entitled to the use of the property. . . .

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 evidence in the record, the AAO finds that the applicant’s crime was retail theft. She was thus convicted of knowingly taking the property of another with intent to permanently deprive that person of the property, a crime involving moral turpitude, and is inadmissible 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), (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 relative that qualifies is the applicant’s daughter. Hardship to the applicant herself is not relevant 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 or 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.

The record reflects that the applicant is the mother of [REDACTED] a 39-year-old naturalized U.S. citizen.¹ The applicant's daughter is a qualifying family member for section 212(h) of the Act extreme hardship purposes.

¹ The applicant indicated on her Application to Adjust Status (Form I-485) filed May 11, 2009 that she is also the mother of [REDACTED]. DHS records show that [REDACTED] was a U.S. lawful permanent resident who naturalized to become a U.S. citizen on September 30, 2009. However, the applicant's waiver application does not list [REDACTED] as a qualifying relative. Nor has the applicant furnished evidence of hardship to [REDACTED]. Therefore, only hardship to [REDACTED] will be considered in these proceedings.

The record contains a notarized letter from the applicant's daughter dated September 9, 2009, which was filed with the waiver application. The applicant's daughter states in her letter that she is the only child in charge of her mother's care. She states that her mother is 65 years old and depends on her care and love. She states that she and her mother emotionally depend on each other. She states that even though her mother has a son in Peru, they do not know where he is, and she is the only person taking care of and supporting her mother.

On January 25, 2010, the AAO received a letter from counsel stating that the applicant suffered a stroke on January 4, 2009 and was admitted to the intensive care unit of the Florida Medical Center located in Fort Lauderdale. Counsel submitted a letter dated January 9, 2010 from [REDACTED] Northshore Medical Center FMC Campus. [REDACTED] states that the applicant was admitted to the hospital on January 4, 2010 for severe Cerebral Infarction that has left her with life threatening physical and cognitive disabilities. [REDACTED] notes that the applicant's condition is critical and guarded, and there is a possibility that she may not recover or survive.

[REDACTED] states in his letter that the applicant's condition warrants that she would be unable to travel and that she will require aggressive long-term therapy and 24 hour care if she recovers. The AAO notes that in this case, the applicant would likely only return to Peru if her health condition stabilizes to the extent that she can travel. If these conditions are met and the applicant returns to Peru, the applicant must demonstrate that her daughter, who is a native of Peru, would experience extreme hardship if she remains in the United States or relocates to Peru.

The AAO notes that the applicant's daughter's initial letter fails to accurately present the applicant's family ties in the United States and Peru. [REDACTED] letter states, "Because of her condition, the family has requested I write this letter so that perhaps her Son, who resides in Lima Peru, might be able to receive a Temporary Visa to come to the United States in order to visit his mother." This statement is in conflict with the applicant's daughter's assertion that the applicant's mother does not know her son's whereabouts. The applicant's daughter has provided no information to resolve this inconsistency. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988)(It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence.).

Furthermore, the Application to Register Permanent Residence or Adjust Status (Form I-485) filed by the applicant's mother reflects that she has two other daughters, [REDACTED] and [REDACTED]. DHS records reflect that [REDACTED] is a naturalized U.S. citizen. The record does not show whether [REDACTED] resides in the United States or in Peru. The applicant's daughter states in her letter, "I am the only child in charge of my mother's care." However, her letter fails to articulate the reason she was compelled to become the applicant's sole caretaker. The applicant's daughter has not discussed whether her siblings would be able to support her mother in Peru. In addition, the applicant's daughter has not asserted or demonstrated that she would not be able to visit her mother in Peru.

The AAO acknowledges that the applicant's daughter will suffer emotionally if she is separated from her critically ill mother, but she has failed to demonstrate that this hardship, when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship described by the applicant's daughter, and as demonstrated by the evidence in the record, is the common result of removal or inadmissibility and

does not rise to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. For these reasons, the AAO cannot conclude that the applicant's daughter would suffer extreme hardship if she remains in the United States separated from her mother.

Finally, the AAO finds that the record does not demonstrate hardship to the applicant's daughter if she relocates to Peru. For instance, the applicant's daughter does not state or demonstrate that she would experience financial hardship if she relocated. Reports on the cost and availability of medical treatment in Peru have not been submitted. Further, there is nothing in the record which demonstrates that the applicant's daughter has binding family and community ties to the United States. Moreover, the record fails to discuss whether the applicant's two children who appear to reside in Peru, [REDACTED] and [REDACTED] would be able to provide their sister with assistance in caring for the applicant. 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)). Accordingly, the AAO cannot determine that the applicant's daughter would suffer extreme hardship if she relocated with the applicant to Peru.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's daughter, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.