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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

PUBLIC COPY

#2

FILE:

Office: BALTIMORE

Date:

MAR 22 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:

SELF-REPRESENTED

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 District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ecuador 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 spouse and children.

The District Director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on her qualifying relatives, her U.S. citizen spouse and children, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, the applicant asserts that her husband and children will suffer extreme psychological and financial hardship if her waiver is denied.

In support of the waiver application, the record contains, but is not limited to, financial documentation, two letters from the applicant, the applicant's children's birth certificates, the applicant's spouse's birth certificate, and a letter from the Department of Veterans Affairs.

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 in Anne Arundel County, Maryland on February 28, 2002 and charged with “theft – scheme: \$500 plus.” The applicant, who was born on December 23, 1980, was 21 years old at the time she committed the crime that resulted in her arrest.

The record shows that the applicant was convicted in the District Court of Maryland for Anne Arundel County, on May 13, 2002, of “theft – scheme: \$500 plus” in violation of section 7-104 of the Maryland Criminal Code (Md. Crim. Code § 7-104), a felony subject to imprisonment not exceeding 15 years or a fine not exceeding \$25,000 or both. The applicant was sentenced to 18 months probation, and payment of restitution and fines [REDACTED]

The applicant furnished an Order for Expungement of Police and Court Records from the District Court of Maryland for Anne Arundel County ordering the expungement of police records pertaining to the arrest, detention, or confinement of the applicant on or about February 28, 2002. Under the current statutory definition of “conviction” provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). The applicant, therefore, remains convicted for immigration purposes.

Md. Crim. Code Ann. § 7-104 (West 2000) provides, in part:

Unauthorized control over property

- (a) A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:
- (1) Intends to deprive the owner of the property;
 - (2) Willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
 - (3) Uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Unauthorized control over property—By deception

- (b) A person may not obtain control over property by willfully or knowingly using deception, if the person:
- (1) Intends to deprive the owner of the property;
 - (2) Willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
 - (3) Uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Possessing stolen personal property

(c)(1) A person may not possess stolen personal property knowing that it has been stolen, or believing that it probably has been stolen, if the person:

- (i) Intends to deprive the owner of the property;
- (ii) Willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
- (iii) Uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property. . . .

Control over property lost, mislaid, or delivered by mistake

(d) A person may not obtain control over property knowing that the property was lost, mislaid, or was delivered under a mistake as to the identity of the recipient or nature or amount of the property, if the person:

- (1) Knows or learns the identity of the owner or knows, is aware of, or learns of a reasonable method of identifying the owner;
- (2) Fails to take reasonable measures to restore the property to the owner; and
- (3) Intends to deprive the owner permanently of the use or benefit of the property when the person obtains the property or at a later time.

Services available only for compensation

(e) A person may not obtain the services of another that are available only for compensation:

- (1) By deception; or
- (2) With knowledge that the services are provided without the consent of the person providing them. . . .

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, “It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . .”); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, “Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].”) A conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

Upon review of Maryland court decisions, the AAO finds that a conviction for theft under the Maryland Criminal Code requires the specific intent to deprive the victim of his or her property permanently. In *Price v. State*, the Maryland Court of Special Appeals discussed the distinctions between a conviction for theft and a conviction for carjacking. 681 A.2d 1206 (1996). The Court stated that a theft conviction “requires proof of circumstances that would indicate the offender’s intent permanently to deprive the owner of his or her property whether by way of appropriating it to one’s own use or concealment or abandonment in such a manner as to deprive the owner of the property” while carjacking “does not require that there be any asportation or removal of the vehicle for criminal responsibility to attach.” 681 A.2d at 1214. In *Gamble v. State*, the Maryland Court of Special Appeals discussed whether the offender’s conduct constituted a “trespassory taking.” 552 A.2d 928 (1989). The Court stated that the primary elements of the theft statute are “willfully and

knowingly obtaining unauthorized control over the property or services of another, by deception or otherwise, with the intent to deprive the owner of his property by using, concealing, or abandoning it in such a manner that it probably will not be returned to the owner.” 552 A.2d at 931. The Court concluded that the offender committed theft because the evidence indicated that he “took the money with the intent permanently to deprive the rightful owner of it.” *Id.* Therefore, the AAO finds that a conviction for theft under Md. Crim. Code § 7-104 is categorically a crime involving moral turpitude because it requires the permanent intent to deprive the victim of his or her property. The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act as a consequence of her conviction for theft. The applicant has not disputed her inadmissibility on appeal.

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 U.S. citizen spouse and two minor children, seven-year-old [REDACTED] and four-year-old [REDACTED]. 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 applicant submitted a letter dated September 21, 2006 with her waiver application. The applicant states that she is a full-time mother and wife and her husband provides food and shelter. She states that if she has to leave the United States, her husband and children will suffer because there is no one in her family that can assist them. She states that taking her children to Ecuador will create a burden on her husband because he does not speak Spanish and does not have the skills that will allow him to find a job in Ecuador. She states that her children will not have the opportunity to be educated in the United States. She states that her life without her husband and children will be extremely hard. She states that she does not have skills to secure a job in Ecuador. The applicant reiterated these concerns in the January 22, 2007 letter she filed with the appeal notice.

The applicant furnished a letter dated April 1, 2002 from the Department of Veterans Affairs. The letter states that the applicant’s spouse is in receipt of disability compensation on account of service-connected disability. The letter further states that the applicant’s spouse is 50% disabled and on December 1, 2001 he was awarded a monthly payment of \$625.00. The applicant also furnished a May 14, 2001 document entitled “Findings of the Physical Evaluation Board Proceedings,” which states that the applicant’s spouse suffers from “mechanical low back pain secondary to motor vehicle accident” and it “may be permanent.” The AAO finds that these documents establish that the applicant’s spouse suffered from low back pain that resulted in his separation from active military duty. However, the appeal notice was filed over four years after the issuance of the April 1, 2002 Department of Veterans Affairs determination. The applicant has not furnished updated medical documentation to reflect the current status of her spouse’s medical condition. Nor has she demonstrated the extent of his disability. There is nothing in the record to demonstrate whether his disability has impaired his ability to work and care for his children. Further, the record does not indicate whether the applicant’s spouse depends on the applicant to assist with his activities of daily

life. Therefore, the AAO cannot conclude that the applicant's spouse will suffer extreme hardship as a result of his medical condition if he is separated from the applicant.

The AAO acknowledges that the applicant's spouse and children will experience emotional hardship if they remain in the United States without the applicant, but the applicant 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 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.

Finally, the AAO finds that the applicant has not demonstrated that her spouse and children will suffer extreme hardship if they relocate with her to Ecuador. The applicant has not indicated whether her children speak Spanish and the level of their familiarity with the culture and customs of Ecuador. Further, the applicant has not stated or demonstrated that her children would be unable to receive an education in Ecuador. The Affidavit of Support Under Section 213A of the Act (Form I-864) filed by the applicant's spouse reflects that he is an electronics technician. The AAO understands that the applicant's spouse may have difficulties finding employment as a technician without a basic understanding of the Spanish language. However, the applicant has failed to demonstrate that she would be unable to support her family in Ecuador. There is no information in the record regarding whether she has family members in Ecuador that can offer her support. Nor is there any information in the record of her education, employment history, and skills. Moreover, the applicant's spouse has not stated or demonstrated that her husband is in need of ongoing medical care that may not be available in Ecuador. The AAO recognizes that the applicant's family members may face a reduction in the standard of living they are accustomed to if they relocate to Ecuador. However, this is a typical hardship that does not alone rise to the level of extreme. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

In this case, the record does not contain sufficient evidence to show that the financial and emotional hardships faced by the applicant's spouse and children, 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.