**U. S. Department of Homeland Security**
U. S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEWARK, NEW JERSEY Date: MAY 19 2010

IN RE: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Uruguay 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). 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 Ground of Excludability (Form I-601) accordingly.

On appeal, counsel asserts that the director failed to properly consider the submitted documentation and cumulatively weigh the hardship factors. Counsel contends that the applicant's spouse has been a licensed teacher in New Jersey for 13 years and if she lived in Uruguay with the applicant, she would lose her seniority and retirement and would confront Uruguay's high unemployment. Counsel avers that the applicant's stepchild attends college and is financially supported by the applicant's wife.

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 –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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....
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> 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 determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3rd Cir. 2009), makes a categorical inquiry, which consists of

looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute." *Id.* at 465-66. The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute "fits" within the requirements of a CIMT." *Id.* at 470.

However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true "even where clear sectional divisions do not delineate the statutory variations." *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The record reflects that on June 14, 2004, the applicant was convicted in the New Jersey Superior Court for Hudson Country of receiving stolen property in violation of New Jersey Stat. Ann. § 2C:20-7. He was sentenced to probation for three years on the condition that he perform 25 hours of community service, comply with the Probation Department, and undertake efforts to become a legal alien.

New Jersey Stat. Ann. § 2C:20-7a provides:

> A person is guilty of theft if he knowingly receives or brings into this State movable property of another knowing that it has been stolen, or believing that it is probably stolen. It is an affirmative defense that the property was received with purpose to restore it to the owner.

New Jersey Stat. Ann. § 2C:20-3a. provides that "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, immovable property of another with purpose to deprive him thereof."

New Jersey Stat. Ann. § 2C:20-1a states that to deprive another of his or her property means:

> (1) to withhold or cause to be withheld property of another permanently or for so extended a period as to appropriate a substantial portion of its economic value ... or (2) to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it.

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). New Jersey Stat. Ann. § 2C:20-1a defines the term "deprive" to include withholding property of another permanently or for an extended period so "as to appropriate a substantial portion of its economic value" or "to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it." In view of the fact that the affirmative statutory defense to the crime of receiving stolen property is "that the property was received with purpose to restore it to the owner," the AAO finds that the term "deprive" under New Jersey Stat. Ann. § 2C:20-1a indicates an intention to permanently deprive an owner of his property. Thus, the AAO finds that the offense of which the applicant was convicted under New Jersey Stat. Ann. § 2C:20-7a involves moral turpitude, as there was an intention to permanently deprive the owner of his property.

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 -
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> . . .
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> (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 relatives here are the applicant's naturalized citizen spouse and his stepchildren. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 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).

Extreme hardship to the applicant's spouse and stepson must be established in the event that they join the applicant to live in the Uruguay, and alternatively, if they remain in the United States without the applicant. 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's wife asserts in her affidavit that it is very difficult to find work, even as a teacher, in Uruguay; and she states that most people earn approximately $100 every week. She claims that if she moved to Uruguay she would lose her seniority gained by working at the same school for 12 years, and that she would not be able to financially assist her daughter, who is in college. She avers that she would lose her health care benefits and her retirement benefits if she moved to Uruguay, and she states that most people in Uruguay are without health care and that it would be difficult for her to build a retirement there. She contends that her son would have to move to Uruguay and face the extreme hardship of leaving his friends and school, and would have difficulty reading and writing in Spanish.

Although the AAO acknowledges that the applicant's spouse will give up her position as a public school teacher and its associated benefits if she relocates to Uruguay, we find that she has not established that she will be unable to obtain employment as a teacher or in other employment for which she is qualified that will provide healthcare and retirement benefits, and an adequate salary in which to live in Uruguay. We note that the applicant has not shown that he will be unable to obtain employment in Uruguay in which to support his family. The AAO notes that the submitted *Country Reports on Human Rights Practices – 2005*: Uruguay, 4 (March 8, 2006), conveys that more than 80 percent of the public sector was unionized. Furthermore, the submitted *Country Reports on Economic Policy and Trade Practices – 2001*: Uruguay 2 (February 2002), reflects per capita gross domestic product of $6,000, and indicates that Uruguay is "among the most advanced countries in Latin America," and "has the highest literacy rate," and has "the most equitable income distribution and the lowest urban poverty in Latin America." The applicant has not fully demonstrated how the asserted hardships of his stepson's leaving the United States and having difficulty in Spanish will result in extreme hardship to his stepson. We note that the applicant's spouse is a Spanish language teacher.

The hardship factors asserted in this care are the applicant's spouse giving up her seniority, health care, and retirement; not finding employment as a teacher that will provide health care and a retirement plan; having to live in poverty due to low wages; and the language and emotional hardships of the applicant's stepson. The applicant has not shown that his wife will be unable to obtain employment as a teacher or in another occupation for which she is qualified, that will provide retirement and healthcare benefits as well as a sufficient income in which to live; or shown that he will be unable to obtain employment in which to support his family. The applicant has not fully addressed how the emotional and language hardships of his stepson will result in extreme hardship to his stepson. Thus, the applicant has not established that the combination of hardship factors demonstrate that his wife and stepson will experience extreme hardship if they joined him to live in Uruguay.

The applicant's wife states in her affidavit that the applicant helps pay expenses and supplements her income, allowing her to stop working as a tutor and spend more time with her children. She declares that the applicant picks up and takes care of her son so she no longer has the expense of a child sitter. She states that the applicant and her son have a close relationship and would experience extreme hardship without her husband. The applicant's wife declares that she would need a second job without her husband's salary. She contends that she would experience the emotional hardship of losing a partner with whom she has a close relationship, and she maintains that she was abandoned by her former spouse and she and her son learned to trust the applicant. The record reflects that the

applicant's spouse has been a Spanish teacher (tutor) at Seton Hall University since 1996, has been a Spanish teacher at a high school for 11 years, and grossed $64,900 in 2005.

Family separation must be considered in determining hardship. In *Salcido-Salcido v. INS,* 138 F.3d 1292 (9th Cir. 1998) the Ninth Circuit discussed the effect of emotional hardship on the alien and her husband and children as a result of family separation. The Ninth Circuit stated that "the most important single hardship factor may be the separation of the alien from family living in the United States" and that there must be a careful appraisal of "the impact that deportation would have on children and families." *Id.* at 1293. Furthermore, the Ninth Circuit indicated that "considerable, if not predominant, weight," must be attributed to the hardship that will result from family separation. *Id.* In *Yong v. INS*, 459 F.2d 1004 (9th Cir. 1972), the Ninth Circuit reversed a BIA decision denying an application for suspension of deportation, noting that "[s]eparation from one's spouse entails substantially more than economic hardship." *Id.* at 1005. Similarly, the Third Circuit in *Bastidas v. INS*, 609 F.2d 101 (3rd Cir.1979), explicitly stressed the importance to be given the factor of separation of parent and child.

The hardship factors asserted here are the loss of income from the applicant and the emotional hardship of family separation. In view of the substantial weight that is given to family separation in the hardship analysis, and in light of the significant emotional impact that separation from the applicant has had on his wife, we find the applicant has demonstrated that the hardship that his wife will experience as a result of separation is extreme.

The applicant has established extreme hardship to his spouse if she remains in the United States without him. However, he has not shown that she will experience extreme hardship if she joined him to live in Uruguay. 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.

Having found the applicant statutorily ineligible for relief, no purpose would be 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.