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



U.S. Citizenship
and Immigration
Services

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FILE:

Office: LOS ANGELES, CA

Date: OCT 08 2010

IN RE:

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:

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,

Perry Rhew
for

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico. The Field Office Director stated that the applicant was inadmissible under 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 committing crimes involving moral turpitude. 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) on October 22, 2007.

On appeal, counsel for the applicant asserts the Field Office Director's decision misstated facts and that submitted evidence was not properly evaluated.

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.

A waiver is available for this ground of inadmissibility. 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 . . .

In *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. 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).

The record reflects that the applicant was convicted of Petty Theft, Cal. Penal Code § 484(a), on March 21, 1991. On January 30, 2002, the applicant was convicted in the Superior Court of California, County of Los Angeles, of Petty Theft with Prior Jail Term, Cal. Penal Code § 666. The record also indicates that the applicant was convicted of Petty Theft with Prior Jail Term, Cal. Penal Code § 666, in the Superior Court of California, Los Angeles, on November 26, 2002.

On appeal, counsel for the applicant asserts that the applicant’s charges were re-opened, reduced to a misdemeanor status, and then dismissed. A review of the record reveals a California Superior Court Petition and Order under California Penal Code § 1203.4 vacating the applicant’s November 26, 2002, and March 21, 1991, convictions. Despite this, the applicant remains convicted of these charges for immigration purposes. In *Matter of Marroquin*, 23 I&N Dec. 705, 717 (AG 2005), the Attorney General noted:

Section 1203.4(a) of the California Penal Code does not serve to provide relief that is based on a judgment about the legal propriety of the underlying judgment of conviction. It merely provides a means by which certain defendants who have been lawfully convicted and subjected to punishment may be relieved of many, though not all, of the remaining legal consequences that normally attend an adjudication of guilt.

Therefore, notwithstanding the relief that applicant received under section 1203.4(a) of the California Penal Code, he remains convicted of these charges for immigration purposes.

With regard to whether the applicant’s crime constitutes a crime involving moral turpitude, U.S. Courts have long held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. *Matter of Garcia*, 11 I. & N. Dec. 521 (BIA 1966); *See also 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)(concluding that larceny, petty or grand, involves moral turpitude). However, 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).

The AAO has reviewed the statutes, case law and other documents related to the applicant’s conviction under California Penal Code § 484(a), as well as the relevant precedent decisions from the Board of Immigration Appeals and the courts. In *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 2009), the Ninth Circuit Court of Appeals determined that Cal. Penal Code § 484(a) is categorically a CIMT because it requires an intended permanent taking. Therefore, the AAO concurs with the director that the applicant has been convicted of three crimes involving moral turpitude and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant’s spouse and

children are the qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment

after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “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.” *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. See *Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; see also *U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. See, e.g., *Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting

Contreras-Buenfil v. INS, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422. Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The record includes, but is not limited to, counsel's brief; a statement from the applicant's spouse; a statement from [REDACTED] asserting the applicant's son has been diagnosed with Asthma and is being treated with medicines to treat his condition; a letter from [REDACTED] discussing the applicant's spouse's pursuit of a High School Diploma; copies of invoices for household utilities; a letter from the applicant's employer, tax records and pay stubs for the applicant and his spouse; the applicant's children's birth certificates; and court records related to the applicant's convictions.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Counsel for the applicant asserts that it would constitute an extreme hardship for the applicant's spouse and children if they were to relocate to Mexico with the applicant because the applicant's son has asthma and the environmental conditions in Mexico would exacerbate his condition. The applicant's spouse has also submitted a letter asserting that her son has a serious case of asthma and that relocation to Mexico City, where the applicant's family resides, would cause him to suffer asthma attacks. The record contains a letter from [REDACTED] stating that the applicant's son has asthma, that he has been prescribed medications for this condition, and that he needs his parents to help him maintain his medication regimen.

The record contains sufficient evidence to establish that the applicant's son has asthma. Although the medical evidence submitted does not articulate the severity of the condition, or describe the impact it has on the child's daily life, the AAO acknowledges that it requires medication to control. With regard to the hardship on the child if he were to relocate to Mexico with the applicant, the record does not contain any evidence that he would be unable to receive treatment for his condition. While the AAO would be willing to accept that the conditions in Mexico could exacerbate the child's condition, these assertions are not made by a medical doctor or based on any evidence submitted in the record.

The applicant's spouse has asserted that she would not be able to find employment sufficient to support herself and her children if they were to relocate to Mexico. The applicant's spouse previously stated that she has some experience as a seamstress, and the record also contains documentation that the applicant himself has significant experience in the seaming industry. Without documentary evidence which is probative of the applicant's spouse's assertion that she would be unable to find employment in Mexico, the AAO cannot make a determination that she would experience financial impacts that would rise to the level of extreme.

The applicant's spouse also asserts that, due to the age of her children, relocation to Mexico at this time would disrupt their education. She asserts that they only speak conversational Spanish, and would fall behind in school due to their lack of fluency in Spanish.

Court decisions have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style, The BIA found that uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the circuit court stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. In *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

In this case, the applicant's daughter is 12 years old and the applicant's son is 16 years old, of grade school age. They have lived their entire lives in the United States. Although the land and culture in Mexico would not be completely foreign to them, and they speak some Spanish, the AAO recognizes the difficulties that would arise from their relocation at this point in their education. Although none of these factors are sufficient to establish extreme hardship in and of themselves, when they are considered in the aggregate, they are sufficient to indicate that the applicant's children would experience extreme hardship upon relocation.

Although the record indicates that a qualifying relative of the applicant would experience extreme hardship upon relocation, it must still be established that they would experience extreme hardship if they remained in the United States during the applicant's period of inadmissibility.

With regard to extreme hardship upon separation, counsel for the applicant has asserted that the applicant's family will experience extreme financial and emotional hardship. The applicant's spouse has asserted that the applicant is the sole financial support for their family, and that she would be unable to support herself and her family without the applicant's presence.

The record includes employment and financial records for the applicant and his family. An examination of the tax returns and W-2 forms submitted indicates that the applicant was the primary revenue earner for his family, earning roughly \$22,000 annually. It does not appear that the applicant's spouse earned any significant income. The record also contains a statement from the high school equivalency program that his spouse attends, indicating that she is currently attempting to gain a high school equivalency degree.

While the AAO recognizes financial impact as a hardship impact, in this case the evidence submitted is not sufficiently probative to establish the degree of economic impact. The record does not indicate that the applicants' spouse has attempted to find employment in the United States to support her family, or that she would be incapable of finding employment sufficient to support herself and her children. In addition, there is insufficient documentation to establish what the applicant's spouse's financial obligations are. Therefore, the AAO cannot conclude that the applicant's spouse or children would suffer significant financial hardship upon separation from the applicant.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, does not support a finding that the applicant's spouse or children would face extreme hardship upon separation from the applicant. The AAO recognizes that the applicant's qualifying relatives may experience some financial and emotional impact. However, 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 removal.

The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse and children as required under section 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 section 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.