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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: BALTIMORE, MARYLAND

Date: **SEP 24 2010**

IN RE:



APPLICATION:

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

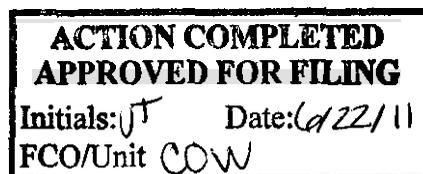
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that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

Thank you,

Perry Rhew
for

Perry Rhew

Chief, Administrative Appeals Office



DISCUSSION: The waiver application and subsequent motion to reconsider was denied by the District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Ghana. The 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 a Crime Involving Moral Turpitude. The applicant is applying for a waiver of inadmissibility under section 212(h) of the Act in order to remain in the United States with his U.S. citizen father and son.

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) January 5, 2007. The applicant submitted a motion to reconsider, which was denied subsequently denied. The denial of that motion is now before the AAO on appeal.

On appeal, counsel contends that the Director failed to properly consider the evidence of hardship in the aggregate.

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.

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 indicates that the applicant was convicted of Theft, less than \$300, in Prince George’s County, Maryland, on June 9, 1997. (Case No. 2E00065571).

The case has subsequently been expunged, and is only a part of the record due to the applicant’s disclosure at an adjustment hearing. The Field Office Director failed to establish which particular

code section the applicant was convicted of, beyond stating that the maximum punishment for the misdemeanor conviction was 18 months and that the applicant was not qualified for the petty offense exception. An examination of the court records printout lists the crime for which the applicant was convicted, but does not point to a specific section of law. At the time of the applicant's conviction, the crime of Theft, less than \$300, was encoded in the Maryland Code of 1957, Article 27, § 342, and stated, in relevant part:

(a) A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over property of the owner, and:

- (1) Has the purpose of depriving the owner of the property; or
- (2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive 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.

* * *

(f)(1) A person convicted of theft where the property or services that was the subject of the theft has a value of \$300 or greater is guilty of a felony and shall restore the property taken to the owner or pay him the value of the property or services, and be fined not more than \$1,000, or be imprisoned for not more than 15 years, or be both fined and imprisoned in the discretion of the court.

(2) A person convicted of theft where the property or services that was the subject of the theft has a value of less than \$300 is guilty of a misdemeanor and shall restore the property taken to the owner or pay him the value of the property or services, and be fined not more than \$500, or be imprisoned for not more than 18 months, or be both fined and imprisoned in the discretion of the court; however, all actions or prosecutions for theft where the property or services that was the subject of the theft has a value of less than \$300 shall be commenced within 2 years after the commission of the offense.

The applicant has asserted that his conviction was expunged. 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.

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 state court decisions interpreting theft laws in the state, 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. See *Price v. State*, 681 A.2d 1206 (1996)(discussing the distinction between a theft statute, which involved specific intent to permanently deprive someone of property, and a carjacking statute, which did not). An examination of the statute in question does reveal that the maximum sentence of incarceration for this misdemeanor is 18 months, an unusual configuration. Nonetheless, section 212(a)(2)(A)(ii)(II) is clear, the petty offense exception only applies to crimes where the maximum sentence of incarceration is one year or less, and as such, despite having been convicted of a relatively minor misdemeanor theft, the conviction does not qualify for the petty offense exception.

The AAO is unaware of any state case in which the statute in question was applied to conduct which did not constitute a CIMT. Given that the statute required that the elements of scienter and permanent taking are elements necessary in order to be convicted, the AAO finds that a conviction under this statute may be categorically considered a CIMT.

As such, he is inadmissible under section 212(a)(2)(A) 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

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 father and son are the qualifying relative 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, the following evidence: a brief from counsel; business documentation for the applicant's father's realty business; copy of a disposition for the applicant's theft conviction; statements from the applicant and the applicant's father; copies of birth and naturalization certificates; statement from [REDACTED] pertaining to the medical conditions of the applicant's father; medical records of the applicant's father; statement from [REDACTED] pertaining to the applicant's employment; statements from acquaintances testifying to applicant's moral character; country conditions materials, including the section on Ghana from the CIA World Fact Book, and a Country Report on Human Rights Practices, section on Ghana, published by the U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, March 8, 2006.

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

Counsel has asserted on appeal that the applicant's father and son would suffer emotional, financial and physical hardships as a result of the applicant's inadmissibility. Specifically, counsel outlines that the applicant's son's mother cannot take care of him in the applicant's absence; the applicant's father suffers from diabetic retinopathy and cystoid macular edema severely limiting his physical abilities and would also be unable to look after the applicant's son; that the applicant's father relies on him to run his father's business which would fail without the applicant; that the applicant's father depends on him physically by transporting him to medical appointments and ensuring the administration of his medication; and that the applicant's father's wife would be unable to provide these services for him because she does not drive and does not understand the U.S. healthcare system.

The record includes medical records which are sufficient to establish that the applicant's father has a significant medical condition. The applicant and his father have both submitted statements indicating the degree of assistance the applicant provides to his father, and this fact is mentioned in a statement from the applicant's father's attending physician. While the applicant's father is married, the record indicates that his wife is limited in her capacity to assist him.

The record contains business documentation, evidence of the applicant's father's business ownership, the businesses income, and a statement from a CPA attesting to the applicant's contribution to running the business. This evidence is sufficient to establish that the applicant's father owns a realty business, and that the applicant's son is instrumental in running this business. Given the applicant's father's age and limited physical abilities, it is reasonable to conclude, based on testimony and other evidence in the record, that the applicant's father's business would suffer significantly if the applicant were removed from the United States. This is significant because in this manner the applicant's father is financially dependent on the applicant to maintain his source of income, the realty business he owns.

The record contains documentation that the applicant's son is a U.S. citizen and has resided his entire life in the United States, and that the applicant has been the primary caregiver and custodian of the child, responsible for him financially, emotionally and physically. The applicant and his father both assert and the record shows that the applicant's son's mother is in the United States as a student, and would be unable to work to support her son in the applicant's absence. Based on these findings the AAO can conclude that the applicant's son would experience significant financial and emotional hardship if the applicant was removed and he remained in the United States, both due to the fact that he has no other guardian or source of financial support.

The AAO finds that these are significant factors in determining extreme hardship. When these factors are considered in an aggregate context they rise above the impacts commonly experienced by the relatives of inadmissible aliens, and establish that a qualifying relative of the applicant would experience extreme hardship if separated from the applicant.

With regard to relocation the applicant has asserted that he cannot relocate his son to Ghana because of the conditions there. The applicant has submitted a statement asserting that his father cannot relocate to Ghana because he has substantial community and family ties here, and because he has no family ties in Ghana, has serious medical conditions and established medical relationships in the United States, and because his father's wife and minor child have never been to or resided in Ghana. The record contains country conditions materials, medical evidence of the applicant's father's condition, evidence of his family and community ties and evidence of the financial impact that would ensue if he were to relocate. This evidence is sufficient to support the applicant's assertions. When considered cumulatively, the record establishes that a qualifying relative would also experience extreme hardship upon relocation to Ghana with the applicant.

As the record establishes that a qualifying relative will experience extreme hardship upon relocation and separation, the AAO may now consider the applicant's waiver as a matter of discretion.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The factors which weigh in favor of the applicant’s waiver include: the presence of his U.S. citizen father and son, both of whom will experience significant hardships if he is removed; his family ties with his father’s family; his employment and business ties to his father’s business; statements submitted attesting to his moral character; and the fact that the applicant has not been convicted of any additional crimes in 13 years.

These factors outweigh the negative factors in this case, which include: the applicant’s conviction for a misdemeanor theft crime; unlawful presence in the United States; and prior employment without authorization. As the positive factors outweigh the negative factors, the AAO determines that a favorable exercise of discretion is warranted.

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. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.