U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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U.S. Citizenship and Immigration Services

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[redacted]

DATE: DEC 0 8 2011 Office: MANILA [redacted]

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 $630. 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 Form I-601, Application for Waiver of Ground of Inadmissibility (Form I-601) was denied by the Director, Manila Field Office, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Fiji. He was found to be inadmissible to the United States 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 a crime involving moral turpitude. The applicant is married to a U.S. citizen, and he is the beneficiary of an approved Form I-130, Petition for Alien Relative. The applicant seeks a waiver of his inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may live in the United States with his spouse.

In a decision dated June 2, 2009, the director determined the applicant failed to establish that his spouse would experience extreme hardship if he were denied admission into the United States. The waiver application was denied accordingly.[1]

On appeal the applicant asserts, through counsel, that his U.S. citizen wife will experience extreme emotional and financial hardship if she remains in the U.S., separated from her husband, or if she moves to Fiji in order to live with him. Counsel indicates further that the applicant's case merits an exercise of discretion. No new evidence is submitted on appeal. Counsel does not contest that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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.
>
> (ii) Exception. Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> > (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

[1] It is noted that the applicant previously filed a waiver application with the Manila Field Office in 2005. The waiver was denied by the director on August 23, 2005. The applicant did not appeal the decision.

> (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 . . . .
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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 *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a 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.

In the present matter, the record contains criminal indictment and conviction evidence reflecting the applicant was convicted on August 15, 2003, in the Resident Magistrate's Court at Suva, Fiji, of the crime of Larceny by Servant, in violation of Section 274(a)(i) of the Fijian Penal Code. He was sentenced to nine months imprisonment, suspended for twelve months.

The Laws of Fiji, Chapter 17, Penal Code, Division V, Chapter XXVII, provide at Section 274:

> Section 274 – *Larceny and embezzlement by clerks or servants*
>
> Any person who-
>
> (a) Being a clerk or servant or person employed in the capacity of a clerk or servant-
>
> (i) Steals any chattel, money or valuable security belonging to or in the possession or power of his master or employer.

Section 259 of the Fijian Penal Code defines the term, "steals", stating in pertinent part:

> Section 259 -- *Definition of theft*
>
> (1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

Section 262 of the Fijian Penal Code provides in pertinent part:

> Section 262 -- *General punishment for theft*

> (1) Stealing for which no special punishment is provided under this Code or any other Act for the time being in force is simple larceny and a felony punishable with imprisonment for five years.

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). *See also In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006) (In determining whether theft is a crime of moral turpitude, the BIA considers "whether there was an intention to permanently deprive the owner of his property.")

In the present case, the statutory requirements for a conviction of Larceny by Servant under section 274(a)(i) of the Fijian Penal Code do not specify that an intent to permanently deprive an employer of property is required. Section 274(a)(i) does reflect, however, that "stealing" is a required element of the offence of Larceny by Servant. The definition for stealing contained in section 259 of the Fijian Penal Code, in turn, contains the statutory element of intent to permanently deprive an owner of their property. Accordingly, the offense of Larceny by Servant necessarily includes the element of intending to permanently deprive an owner or employer of their property. The offense is therefore a crime involving moral turpitude. The applicant is thus inadmissible under 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude.

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 –
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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 . . . .

The applicant is married to a U.S. citizen. The applicant's spouse is a qualifying relative for section 212(h) of the Act, waiver of inadmissibility purposes.

Section 212(h) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (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,* 22 I&N Dec. 560, 565 (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. *Id.* 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 exclusive. *Id.* at 566.

The BIA has also held that the common or typical results of 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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 BIA 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.*

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.*, *Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant

not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel asserts on appeal that the applicant's spouse will experience emotional and financial hardship if she remains in the U.S., separated from her husband, or if she moves to Fiji in order to be with him. Counsel indicates that the applicant and his wife have never lived together, and that they fear that due to the applicant's wife's age it may become too late to start a family. Counsel indicates further that the applicant merits a favorable exercise of discretion because his conviction occurred many years ago, he cooperated with authorities after his arrest, and he has committed no other crimes.

Counsel submits no new evidence on appeal. The AAO notes, however that it maintains plenary power to review each appeal on a *de novo* basis. *See, e.g., Dor v. INS,* 891 F. 2d 997, 1002 n. 9 (2d Cir. 1989).

The record in the applicant's case contains previously submitted letters written by the applicant and his wife reflecting the two married in 2005 in an arranged marriage. The letters indicate the applicant has never lived outside of Fiji and that his entire family is in Fiji. The applicant's wife is also originally from Fiji. However, she moved to the U.S. at the age of twenty, and her parents, siblings and their families live in the U.S. The letters reflect the applicant and his wife want to have children together, and due to their ages (now in their forties) they fear that continuing to live separately will keep them from doing so. The applicant's wife presently lives with her eldest sister in the U.S., and she works as a bank teller. The applicant's wife indicates further that her home was burglarized on one occasion, and she wants her husband near to offer more security to her home. In addition, the applicant's wife states that flooding in Fiji caused difficult living conditions in 2009, that the economy in Fiji is unstable, and that she fears she would be unable to find work in Fiji that is similar to the job she holds in the U.S., or that offers sufficient pay and retirement benefits. The applicant's wife is also close to her family in the U.S., and she does not want to move away from them.

The record contains medical records indicating the applicant's wife was treated for Acid Peptic Disease and Gastric Upper Reflux Disease in March 2009, and that the symptoms may potentially have been due to stress. The record additionally contains an April 2009 psychological evaluation of the applicant's wife indicating the evaluation was conducted based on an interview with the applicant's wife, and stating that based on the interview his wife presents symptoms of depression. The evaluation indicates that continued separation from her husband will compound the applicant's wife's stress and depression, and the evaluation recommends individual therapy to assist with the applicant's wife's symptoms. Income and expense information for the applicant's wife is contained in the record, as are general articles on country conditions in Fiji, letters from family members stating their opinions on the hardships the applicant's wife is experiencing, and letters from employers and civic and religious organizations attesting to the applicant's good character.

Upon review, the AAO finds the evidence in the record fails to show that the hardships faced by the applicant's wife, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship.

Although the psychological evaluation contained in the record indicates that the applicant's wife is experiencing symptoms of depression due to her separation from the applicant, it is noted that the evaluator takes into account only information gathered from the applicant's wife's own discussion of her situation. No reference is made to documentary or other evidence reviewed in assessing the applicant's wife's condition, and the evaluation contains no actual diagnosis for the applicant's wife. The record also contains no evidence that the applicant's wife has sought subsequent psychological treatment. The psychological evaluation thus fails to demonstrate that the applicant's wife is experiencing emotional hardship beyond that normally experienced upon separation from a family member, or that she will suffer extreme emotional hardship in the future if the applicant is denied admission into the United States. In addition, the medical information contained in the record fails to indicate or establish that the applicant's wife suffers from an on-going medical condition that would cause her to suffer extreme physical hardship if the applicant were not near her, or for which she would be unable to obtain medical treatment in Fiji. Country condition evidence contained in the record is general, and fails to establish the applicant's wife would face a particular threat or hardship in Fiji. In addition, the financial income and expense evidence contained in the record fails to establish the applicant's wife is experiencing financial hardship due to her separation from the applicant. The evidence also fails to illustrate the applicant's current living or financial situation in Fiji, and fails to establish the applicant would be unable to support his wife if she moved to Fiji. It is noted that the applicant's wife is originally from Fiji and that she lived there until she was twenty years old. She is thus familiar with the language and culture of the country, and the record contains no evidence to corroborate the assertion that the applicant's wife would be unable to find work in Fiji.

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship" Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(h) of the Act, be above and beyond the normal, expected hardship involved in such cases. In the present matter, the applicant has established only that his wife would experience the type of emotional and financial hardship commonly associated with removal or inadmissibility, if the applicant is denied admission into the United States.

Upon review of the totality of the evidence, the AAO finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under section 212(h) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant 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. 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.