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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

H2



Date: DEC 29 2011 Office: CHICAGO, IL

FILE:

IN RE: Applicant:

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:



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

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico 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 been convicted of crimes involving moral turpitude. The applicant does not dispute his inadmissibility. The applicant's mother and three children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. *Field Office Director's Decision*, dated June 25, 2009.

On appeal, counsel asserts that the applicant's qualifying relatives would experience extreme hardship should the application be denied. *Form I-290*, received July 24, 2009.

The record includes, but is not limited to, counsel's appeal and I-601 briefs, the applicant's statement, the applicant's mother's statement, educational records, country conditions information, letters of support, financial documents and criminal documents. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

- (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.

The record reflects that the applicant was sentenced to two years of probation for his conviction on July 22, 1996 of possession/receiving a stolen vehicle under Chapter 625 of Illinois Vehicle Code § 5/4-103(a)(1), which states:

(a) Except as provided in subsection (a-1), it is a violation of this Chapter for:

- (1) A person not entitled to the possession of a vehicle or essential part of a vehicle to receive, possess, conceal, sell, dispose, or transfer it, knowing it to have been stolen or converted; additionally the General Assembly finds that the acquisition and disposition of vehicles and their essential parts are strictly controlled by law and that such acquisitions and dispositions are reflected by documents of title, uniform invoices, rental contracts, leasing agreements and bills of sale. It may be inferred, therefore that a person exercising exclusive unexplained possession over a stolen or

converted vehicle or an essential part of a stolen or converted vehicle has knowledge that such vehicle or essential part is stolen or converted, regardless of whether the date on which such vehicle or essential part was stolen is recent or remote...

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 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.

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.”). The statute at issue is divisible in that it states, “knowing it to have been stolen or converted.” In *People v. Bivens* the court found that by limiting the charge in the indictment to possession of “stolen” vehicle, rather than “converted” vehicle, the state was obliged to prove not only that defendant’s possession of vehicle was unauthorized, but also that defendant intended or knowingly exerted control of property in such manner as to permanently deprive owner of its use and benefit. *People v. Bivens*, App. 1 Dist.1987, 108 Ill.Dec. 944, 156 Ill.App.3d 222, 509 N.E.2d 640. In the applicant’s certified statement of conviction/disposition, the charge is listed as “receive/poss/sell stolen.” As such, the record reflects that he was convicted under the “stolen” language of the statute, and therefore an element of his crime was to permanently deprive the owner of the item at issue. Based on the forgoing, the AAO finds that the applicant’s conviction was for a crime involving moral turpitude and he is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. As the activities for which the applicant is inadmissible occurred more than 15 years before the date of the

application for adjustment of status, the applicant is eligible to file a waiver for this crime under either section 212(h)(1)(A) or 212(h)(1)(B) of the Act.

The record reflects that the applicant was sentenced to six months of court supervision for his conviction on December 7, 2000 of solicitation-sex act under Chapter 720 of Illinois Vehicle Code § 5/11-14(a)(1). The AAO will not determine whether this is a crime involving moral turpitude as a section 212(h)(1)(B) waiver based on extreme hardship would also waive this crime were it to be determined to involve moral turpitude.

(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 –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The AAO will first address whether the applicant is eligible for a waiver under section 212(h)(1)(B) 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 mother and three children are the only 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).

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 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 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.*

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.

The record reflects that the applicant's children are 14, 11 and 9 years of age. Counsel states that the applicant's children are proud U.S. citizens; they have grown up in the United States and proudly celebrate American holidays; they have never been to Mexico; it would be extremely difficult to assimilate; they would lose education opportunities; the applicant's only familiar place is a small rural town in Michoacan with no indoor plumbing, running water, or hospital; the oldest child suffers from lead poisoning which has affected his ability to learn; he needs specialized instruction in many subjects; he has individualized educational programs; and the applicant's mother worries about violence in Mexico. *Brief in Support of Appeal*, dated July 24, 2009. The applicant makes claims similar to counsel. *Applicant's Statement*, dated February 16, 2007. Counsel also states that unemployment is rampant in Mexico and the children will likely end up living in poverty in Mexico. *I-601 Brief*, undated. The record includes supporting documentation reflecting that the applicant's oldest child has a history of lead poisoning and has a learning disability. The record also reflects that the child has an individualized education plan to assist him with his disability. The record includes country conditions information on the education and employment situation in Mexico. The materials submitted indicate that access to education in Mexico is a critical concern, especially in rural areas, and that the quality of education is low.

The U.S. Department of State Travel Warning for Mexico, dated April 22, 2011, details numerous and serious security and safety issues in Mexico. It specifically states, "You should defer non-essential travel to the State of Michoacán, which is home to another of Mexico's most dangerous TCOs, "La Familia". Attacks on government officials and law enforcement and military personnel, and other incidents of TCO-related violence, have occurred throughout Michoacan, including in and around the capital of Morelia and in the vicinity of the world famous butterfly sanctuaries in the eastern part of the State."

The record reflects that the applicant's oldest child is 14 years old. Although he may speak Spanish, he is integrated into the American lifestyle. The AAO noted that the BIA found that a fifteen-year-old child who lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). In addition, he has an individualized educational plan in the United States to assist with his learning disability and a history of lead poisoning. The AAO notes the country conditions information in the record related to education and employment in Mexico, and also that the area of Mexico to which he would relocate to has serious safety issues. Based on these factors, and the normal results of relocation, the AAO finds that the applicant's oldest child would experience extreme hardship upon relocating to Mexico.

Counsel states that the applicant's spouse is a dependent on his application, therefore, the children would be left in the United States with distant family or with their grandmother; the children are very dependent on their parents; the applicant's spouse prepares their meals for them, takes them to school, and does their laundry; they are very attached to the applicant, who helps them with their homework and plays with them; the children would be devastated; his mother is scared that the

applicant would not have a place to stay in Mexico; and she is unable to sleep and is worried and sad; and her spouse is sick. *Brief in Support of Appeal*. The applicant's mother details her emotional difficulty and concern regarding the violence in Mexico. *Applicant's Mother's Statement*, undated.

The record reflects that the applicant's spouse does not have lawful status and applied for derivative status through the applicant. The spouse's application for adjustment of status was denied on the same date as the applicant's. Therefore, the applicant's oldest child could be in the United States without either parent. Even assuming the applicant's spouse were able to remain in the United States, the child would still face separation from his father and financial hardship resulting from the loss of the applicant's income. In addition, as noted, the oldest child has a learning disability requiring an individualized educational plan. Considering these factors, along with the normal results of separation, the AAO finds that the applicant's oldest child would experience extreme hardship upon remaining in the United States.

As the applicant has established extreme hardship to his oldest child, the AAO will not determine whether his two other children or mother would experience extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility 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 section 212(h)(1)(B) 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).

See Matter of Mendez-Morales, 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 adverse factors in the present case include the applicant's convictions (including a DUI conviction related to a November 13, 2000 arrest), entry without inspection, unauthorized period of stay and unauthorized employment.

The favorable factors include the presence of the applicant's U.S. citizen children, extreme hardship to his oldest child, hardship to his other family members, letters in support of his good moral character and completion of an intensive inpatient and outpatient alcohol and drug program in 2003.

The AAO finds that the violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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

ORDER: The appeal is sustained. The waiver application is approved.