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

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Date **DEC 29 2011** Office: CHICAGO, IL

FILE: 

IN RE:

Applicant: 

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.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 her inadmissibility. The applicant's spouse is a lawful permanent resident and her three children are U.S. citizens. She 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 August 11, 2009.

On appeal, counsel asserts that the applicant's spouse would experience extreme hardship and their child requires ongoing medical care. *Form I-290*, received September 14, 2009.

The record includes, but is not limited to, the applicant's spouse's statement, employer letters, the Form I-290B, documents related to extracurricular activities and a medical letter. The entire record was reviewed and considered in arriving at a decision on the appeal.

On February 19, 1998, the applicant was convicted of retail theft under 720 ILCS 5/16A-3(a) and was ordered to pay a \$185 fine and perform 20 hours of community service. On September 20, 2001, the applicant was convicted of retail theft under 720 ILCS 5/16A-3(a) and was ordered to pay a \$300 fine and perform 40 hours of community service.

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-
 - (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (Board) 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...

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 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.

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.

720 ILCS 5/16A-3(a) provides that:

Offense of Retail Theft. A person commits the offense of retail theft when he or she knowingly:

- (a) Takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise;

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."). 720 ILCS 5/16A-3(a) refers to having the "intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession." The record is not clear as to which intention the applicant had in each offense. In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. As such, the AAO finds that even if the applicant had the "intention of retaining such merchandise" this would still have been an intent to permanently take the property. Thus, the AAO finds that the applicant's convictions for retail theft under 720 ILCS 5/16A-3(A) constitute crimes involving moral turpitude.

Section 212(h) of the Act provides, in pertinent part, that:

(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 . . .

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 three children are the only qualifying relatives in this case. The AAO notes that the field office director erred in failing to consider hardship to the applicant's children. 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, 13 and 9 years of age. Counsel states that the applicant's oldest child requires medical care on an ongoing basis. *Form I-290B*. The applicant's spouse states that he would have to leave his job, which includes medical benefits; neither he nor the applicant own a place in Mexico; his mother, brother and sister reside in the United States; his and the applicant's oldest son was diagnosed with asthma in 2001 and is required to visit the doctor every three months to keep it under control; his child's doctor said to keep him in a dust free environment to avoid asthma attacks; it would be difficult to avoid complications in Mexico; his spouse is from a small town with country roads and farm land; all of the dust and dirt would be dangerous to his health; the nearest hospital is far away; their children's education would be greatly affected; the language barrier would be difficult for the children; they would lose opportunities in the United States; they would have to travel a great distance for junior high; they would have to stop attending their extra-curricular activities; and the applicant would be very depressed as she would have to leave her mother who she finally reunited with and her lawful permanent resident grandfather has an incurable illness. *Applicant's Spouse's Statement*, dated June 4, 2008.

The applicant's oldest child's physician states that the child has been his patient since August 1, 2001 with the diagnosis of asthma; it is under control with albuterol; he has some episodes of asthma attacks due to exertion, requiring immediate treatment with albuterol; and he needs regular visits to his office every three months and occasional visits to the emergency room for acute attacks. *Doctor's Letter*, dated May 20, 2008. The record reflects that the applicant's father has chronic kidney disease; he is on dialysis three times a week; he relies on family 100% for care and transportation; and he is requesting that the applicant remain the United States to assist with his life-sustaining treatment. *Letter from Social Worker*, dated June 4, 2008. The record includes evidence reflecting that the applicant's two older children take religious education classes and are involved with sports.

The record reflects that the applicant's oldest child is 14 years old. The record reflects that 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, the applicant's oldest child has been receiving treatment for asthma, he has a long-standing doctor-patient relationship and his asthma can require emergency room visits at times. 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 could not care for his ailing child if the applicant's waiver is denied; he would experience emotional, psychological and financial hardship; and his life would be devastated without the applicant. *Form I-290B*. The applicant's spouse states that the applicant is an important and essential family member; his and their children's life would be greatly affected if

she left; and the applicant provides income for the house and utilities. *Applicant's Spouse's Statement*. As mentioned, the applicant's oldest child's physician states that the child has been his patient since August 1, 2001 with the diagnosis of asthma; it is under control with albuterol; he has some episodes of asthma attacks due to exertion, requiring immediate treatment with albuterol; and he needs regular visits to his office every three months and occasional visits to the emergency room for acute attacks. *Doctor's Letter*. The record includes a letter reflecting that the applicant is working at [REDACTED] she is earning \$13 an hour and she works 40 to 50 hours a week. *Employer Letter*, dated October 4, 2007.

The record reflects that the applicant's oldest child has medical issues, he would be separated from his mother and that the applicant is involved in his life. In addition, he would lose the benefits provided by the applicant's income. 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 her oldest child, the AAO will not determine whether her spouse or two other children 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, entry without inspection, unauthorized period of stay and unauthorized employment.

The favorable factors include the presence of the applicant's U.S. citizen children and lawful permanent resident spouse, extreme hardship to her oldest child, hardship to her other family members, and lack of a criminal record in over ten years.

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.