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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

[REDACTED]

H<sub>2</sub>

FILE: [REDACTED] Office: SAN JOSE, CA Date: FEB 02 2011

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the  
Immigration and Nationality Act (INA), 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*

for Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant, a native and citizen of the Dominican Republic, 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 record indicates that the applicant has a U.S. citizen spouse, father, and two children and a lawful permanent resident mother. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his family in the United States.

In a decision, dated May 13, 2008, the field office director found that the applicant failed to show that a qualifying relative would suffer extreme hardship as a result of his inadmissibility and denied the application accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated June 10, 2008, counsel states that the field office director failed to consider serious hardships to the applicant's spouse. Counsel also states that he will be submitting a brief and additional evidence on appeal.

Section 212(a)(2) of the Act states, in pertinent parts:

(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.

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

(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

(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).

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

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....

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 the recently decided *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.

The record indicates that the applicant has a long criminal history record.

On August 7, 1994 the applicant was arrested and charged in New Jersey for theft of movable property. He was convicted of receiving stolen property on December 13, 1994 and sentenced to thirty days in prison. The applicant, born on December 18, 1974, was twenty-nine years old when he committed this crime.

On September 3, 1998 the applicant was arrested in New Jersey and charged with fraudulent use of a credit card, credit card theft, and theft by deception. He was convicted of credit card theft on June 5, 2000 and sentenced to two years probation.

On October 13, 1998 the applicant was arrested in New York and charged with grand larceny and possession of burglary tools. He was convicted of grand larceny (over \$3,000) and sentenced to five years probation.

On June 30, 2000 the applicant was arrested in Florida and charged with four counts of burglary of an unoccupied conveyance, one count of vehicle theft, four counts of grand theft in the third degree, and one count of fraud. He was convicted of four counts of burglary of an unoccupied conveyance, one count of fraud, and one count of forgery. The applicant’s convictions in Florida are all third degree felonies. He was sentenced to three years probation for each conviction.

We will not determine whether each of the applicant’s crimes are crimes involving moral turpitude, as just one crime, or in some cases two crimes, may be sufficient to make the applicant inadmissible under section 212(a)(2)(A) of the Act. With this in mind, the AAO affirms that the applicant’s New York conviction for grand larceny in the third degree is a crime involving moral turpitude and finds that the applicant is inadmissible under section 212(a)(2) of the Act.

At the time of the applicant’s conviction, NYPL § 155.35 provided, in pertinent parts:

A person is guilty of grand larceny in the third degree when he steals property and when the value of the property exceeds three thousand dollars.

Grand larceny in the third degree is a class D felony

The AAO notes that although the applicant was sentenced to five years probation for this conviction, a Class D felony is subject to a maximum sentence of seven years in prison.

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 AAO notes that although NYPL § 155.35 does not make a clear distinction as to whether a conviction under this section of the statute constitutes a permanent or temporary taking, New York courts have found that to establish larcenous intent, a permanent taking must be intended.

Larceny is defined in NYPL § 155.05 as "when, with the intent to deprive another of property or to appropriate the same to himself or to a third person, [a person] wrongfully takes, obtains or withholds such property from an owner thereof." Deprive is defined in paragraph 3 of NYPL § 155.00:

To "deprive" another of property means (a) to withhold property or cause it to be withheld from another permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to the owner, or (b) to dispose of the property in such a manner or under such circumstances as to render it unlikely that an owner will recover such property.

New York courts have also indicated that larcenous intent is shown when the defendant intends to exercise control over another's property for so an extended period or under such circumstances as to acquire the major portion of its economic value or benefit. *See People v. Jennings*, 69 N.Y.2d 103, 118-122, 504 N.E.2d 1079, 1086-89 (N.Y. 1986). In *People v. Hoyt*, 92 A.D.2d 1079, 461 N.Y.S.2d 569, 570 (N.Y. App. Div. 3<sup>rd</sup> Dept. 1983) the court found that to warrant a larceny conviction, intent to permanently deprive the owner of his property must be established and that a temporary withholding of property, by itself, would not constitute larcenous intent.

In *Ponnapula v. Spitzer*, the Second Circuit Court of Appeals found that the acts covered by NYPL § 155.00 are permanent takings that manifest larcenous intent. 297 F.3d 172, 183-84 (2<sup>nd</sup> Cir. 2002). The court observed that while the intent to temporarily deprive an owner of property does not constitute larcenous intent, such a temporary deprivation occurs only where a person borrows property without permission with the intent to return the property in full to the owner after a short and discrete period of time. *Id.* at 184. Thus, the AAO finds that for the applicant to have been convicted of grand larceny under New York Penal Law § 155.35, it must have been established that he intended to permanently take another person's property. Therefore, his conviction is a crime involving moral turpitude and he does not qualify for the petty offense exception.

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

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

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

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

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a

qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

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

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S.*

*v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

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

The record of hardship includes: counsel’s brief, a statement from the applicant’s parents, a statement from the applicant’s sister, a statement from the applicant’s two biological children, a statement from the applicant’s stepson, and a statement from the applicant’s spouse.

In his brief, dated July 8, 2008, counsel states that the applicant’s spouse would suffer great emotional, psychological, social, and financial hardship if the applicant is not granted a waiver of inadmissibility. Counsel states that the applicant’s spouse has a psychological history of severe depression stemming from separating from her close relatives in August 2002 when she moved from California to start a new life with the applicant and her children. Counsel also states that the applicant’s spouse does not consider relocation to the Dominican Republic a viable option and that she would suffer great financial consequences in the Dominican Republic. Counsel states that because of the bias against middle-aged workers in the Dominican Republic the applicant’s spouse, who now works as a [REDACTED], would not be able to find employment in the Dominican Republic with a salary that would support her family and she would lose her health and retirement benefits. Counsel also states that the applicant feels that due to his age and lack of formal education, he would experience great difficulty in finding employment in the Dominican

Republic. Counsel states further that the applicant and his spouse own a home in the United States and would have to go into foreclosure on the home if they relocated to the Dominican Republic because they could no longer make the payments.

Counsel also states that the applicant's spouse has been living in the United States for twenty years and only has one brother living in the Dominican Republic who she has not spoken to since she left the country. He states that the departure of the applicant and/or the loss of her economic and social support systems in the United States would trigger the applicant's spouse's psychological demise whether she were in the United States or in the Dominican Republic.

Counsel also asserts that the field office director failed to consider hardship to the applicant's other qualifying relatives, including his father, mother, and children.

In a statement dated July 9, 2008, the applicant's parents state that they have been living with the applicant since January 16, 2004 because they both lost their jobs and have been running a small business with the help of the applicant. They state that the applicant's departure will cause economic and emotional hardship for his wife, children, and for them. The applicant's father states that he has chronic diabetes and recently had to have a toe amputated. He states that he and his wife rely on the applicant for help and that the applicant's mother is suffering emotional stress at the thought of him being removed from the United States. The applicant's father states that the applicant's spouse has been suffering severe depression, sees a psychologist, and would face extreme financial hardship if the applicant were removed. He also states that he is concerned with how the applicant's absence would affect his grandchildren. Finally, the applicant's father lists his closest relatives as all living in the New York area, except for the applicant and his family.

In an undated statement, the applicant's sister states that the applicant's removal will cause economic and emotional hardship to the applicant's wife, children, and parents. She states that her father will especially suffer because of his advanced age and chronic diabetes and that he recently suffered a mild stroke. She states that her brother's situation is also affecting her mother's well being, that her brother's departure will cause financial hardship for his spouse and serious mental health issues for his children.

In a letter, dated April 14, 2008, the applicant's children state that if their father is removed from the United States they would be sad because they would not be able to play sports or go for bike rides anymore. They state that they love their father very much and that he is always helping them when they fall down.

In a letter, dated April 11, 2008, the applicant's stepson states that the applicant feels like his real father and that he has known him since he was two years old. The applicant's stepson states that he is a pre-diabetic and that the applicant helps him to stay on track with his weight, eating, and activity levels so that he does not become a diabetic. He states that the applicant is always caring for him and is the first one to come to his aid when he is sick. He states that he cannot imagine life without him and that his mother loves the applicant too much to live without him.

Finally, in a letter, dated April 14, 2008, the applicant's spouse states that she met the applicant when she was a 23-year-old single mother to a one-and-a-half-year-old son. She states that two years after meeting the applicant, she married him and two years after marrying they had their first child together. She states that in July of 2002 she made the biggest decision in her life when she decided to move with the applicant to where his parents were living in [REDACTED]. She states that she was sad to leave her family and friends in New York, but happy to leave the bad influences in their neighborhood. The applicant's spouse states that she will not be able to continue living a joyful and stable life without the applicant's emotional and financial support. She states that when her husband was gone from the house for three months it was a struggle for her family. The applicant's spouse also expresses her fears that she will not be able to support her family or help her children to fulfill their dreams.

The AAO finds that the current record lacks the supporting documentation required to establish extreme hardship. The record does not include any medical documentation regarding the applicant's spouse's history with depression or the various medical problems of the applicant's father. The record also fails to include any documentation regarding the applicant's spouse's ties to the United States, including proof that the applicant and his spouse own a home. The record also fails to establish the family's financial situation. In regards to relocation, the applicant failed to submit any documentation to support the statements made about conditions in the Dominican Republic. The record must reflect, through supporting documentation, that given the specific situation of the applicant and his family, at least one of his qualifying relatives would experience extreme hardship upon relocation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the AAO finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. See 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.