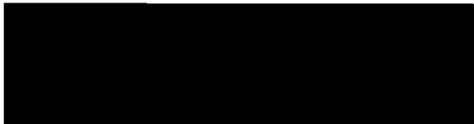


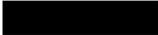
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY



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



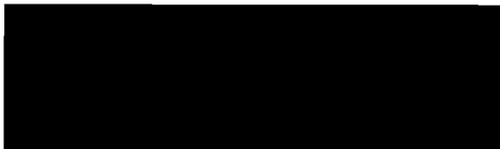
H₂

FILE:  Office: SALT LAKE CITY Date: FEB 17 2011

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,

Michael Shumway

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Salt Lake City, 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 under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel contends that the applicant and his wife have three U.S. citizen children in school. He avers that the applicant's wife and children will experience extreme hardship in Mexico because they have never lived there before, have no family members there, and will live in reduced circumstances. Counsel declares that the situation of the applicant's children will be similar to that of the children in *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001). Counsel states that there is a close relationship between the applicant and his wife and children, and that they depend on him for emotional and financial support. Counsel avers that the applicant's wife is unskilled and unable to obtain more than menial work, and has a physical impairment from an industrial accident, which makes it difficult to obtain a job requiring strenuous physical activity.

We will first address the finding of inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing a crime involving moral turpitude.

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 (other than a purely political offense) 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.)

On October 29, 2001, in Utah, the applicant pled guilty to retail theft (shoplifting), a class B misdemeanor. He received a suspended sentence of 45 days in jail, and was ordered to pay attorney fees. In Utah on November 13, 1995, the applicant pled guilty to retail theft (shoplifting), a class B misdemeanor. He received a suspended sentence to serve 180 days in jail, and was ordered to pay a fine.

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.

Utah Code Ann. § 76-6-602, retail theft, provides, in pertinent part, the following:

A person commits the offense of retail theft when he knowingly:

- (1) Takes possession of, conceals, 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 retail value of such merchandise; or

(2) Alters, transfers, or removes any label, price tag, marking, indicia of value or any other markings which aid in determining value of any merchandise displayed, held, stored or offered for sale, in a retail mercantile establishment and attempts to purchase such merchandise personally or in consort with another at less than the retail value with the intention of depriving the merchant of the retail value of such merchandise; or

(3) Transfers any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment from the container in or on which such merchandise is displayed to any other container with the intention of depriving the merchant of the retail value of such merchandise; or

(4) Under-rings with the intention of depriving the merchant of the retail value of the merchandise; or

(5) Removes a shopping cart from the premises of a retail mercantile establishment with the intent of depriving the merchant of the possession, use or benefit of such cart.

The Board 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."). However, in *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board 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. By its terms, not all of the criminal acts under Utah Code Ann. § 76-6-602 involve the intent to permanently take another person's property. However, the reasoning in *Jurado* applies to the present case as it involves retail theft. Thus, we find that the applicant's commission of two retail theft offenses, which involve knowingly taking goods of another with the intent to permanently deprive that person of such goods, is a crime involving moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

(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 -

...

(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 section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives in this case are the applicant's U.S. citizen spouse and U.S. citizen children. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (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 are possible 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 to be taken is difficult, and it 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 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*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board 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 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).

In rendering this decision, the AAO will consider all of the evidence in the record including birth certificates, the chiropractic report, letters, income tax returns, and other documentation.

Birth certificates reflect that the applicant's children were born on November 24, 1994, May 4, 1998, and April 10, 2000. The report by [REDACTED] dated July 3, 2003 states that the applicant's wife "may hurt for the rest of her life and working may hurt or aggravate her condition. She should find a job that does not seriously hurt or degenerate her condition." The document by [REDACTED] dated June 23, 2003, conveys that the applicant's wife is released with a permanent restriction of no lifting over 20 pounds and no lifting over five pounds with her right hand alone, which "places her within the light classification." The applicant states in the affidavit dated April 29, 2004, that his wife has never recovered from the industrial accident that she had in 2001. He asserts that his wife is limited to working in physically strenuous menial jobs because of her limited English skills, and that the problem with her right hand means that she cannot perform those jobs. He indicates that he is the sole provider for his family and that they will go hungry if he is deported. The applicant maintains that he has lived in the United States for 11-12 years and does not

have any family members in Mexico other than his grandmother. He avers that moving to Mexico would be traumatic for his children because they are used to living and receiving their educational instruction in the United States. He contends that their opportunities and standard of living will be extremely reduced in the Mexico in comparison to what they have in the United States. The applicant indicates that his wife is from Peru and has never lived in Mexico. The applicant maintains that it will be very difficult for him to find a job in Mexico because he has nothing there, no home or friends, only his grandmother, who is too poor and old to help them.

Family separation 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 type of familial 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 otherwise 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 familial relationship involved, the hardship resulting from family separation is 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. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247. 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 stated hardship factor in the instant case is that of the emotional impact to the applicant's wife and three children if they remain in the United States without the applicant. The applicant's assertions that he and his wife and their three U.S. citizen children (ages 10, 12, and 16) have a close relationship, and that they depend on him for emotional support is consistent with the evidence in the record, which are the letters describing the applicant as an excellent father who is family-orientated. In view of the substantial weight that is given to the separation of spouses from one another and of minor children from a parent in the hardship analysis, and in light of the significant influence that the record establishes that separation from the applicant will have on the applicant's wife and children we find the applicant has demonstrated the hardship that his wife and children will experience as a result of separation is extreme.

With regard to having his family members live in Mexico, the applicant asserts that they will confront the hardships of not having any relatives, friends, house, or employment contacts to ease relocation; that they will live in poverty; that his wife's employability will be severely limited because of her lack of education and physical restrictions; and that his children will be forced to adjust, at their stage of social and educational development, to a country that is foreign to them. We note that the applicant's assertions are consistent with current conditions in Mexico as reported by the U.S. Department of State Country Specific Information - 2010 for Mexico, which indicates security risks as a result of high levels of narcotics-related crime and violence that exists throughout Mexico. U.S. Department of State, Bureau of Consular Affairs, *Travel Warning -2010: Mexico*, 1-5 (September 10, 2010). When the hardship factors are considered collectively, the AAO finds they demonstrate extreme hardship to the applicant's spouse and children if they join him to live in Mexico.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

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).

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 are the criminal convictions of retail theft in 1995 and 2001.

The favorable factors are the extreme hardship to the applicant’s wife and children; the letters by family members, neighbors, and friends commending the applicant’s good character; his volunteerism at the [REDACTED] and his steady employment since 1992 with [REDACTED]. Lastly, we note that it has been 9 years since the applicant’s most recent criminal conviction in 2001. The AAO finds that the crimes committed by the applicant are serious in nature; nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.