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

H2



Date: JUL 08 2011

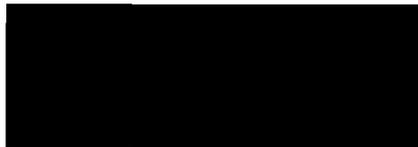
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IN RE:

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,

Michael Shumway

for Perry Rhew

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Cuba 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 committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with her U.S. citizen child and lawful permanent resident child.

In her decision, the field office director concluded that the applicant and counsel had failed to establish how the applicant's removal would result in extreme hardship to a qualifying relative and denied the waiver application accordingly.

In a brief, dated January 16, 2009, counsel states that the applicant's minor children will suffer extreme hardship if their mother is removed to Cuba because she is their only caregiver and family provider.

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.

(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).

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.)

The record shows that the applicant was arrested in Orange County, Florida on December 5, 2000 and charged with one count of grand theft in the third degree under Fl. Stat. § 812.014(2)(c). The applicant, who was born on July 31, 1973, was 27 years old at the time she committed the crime that resulted in her arrest.

The record indicates that on May 29, 2001, in the Circuit Court of the Ninth Judicial District, Orange County, Florida the applicant pled nolo contendere to the charge and the court ordered adjudication of guilt to be withheld. The applicant was ordered to serve one day in jail, fourteen months probation, and 100 hours of community service within one year. The record indicates that on July 28, 2002 the applicant completed the terms of her supervision.

Section 101(a)(48) provides:

- (A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
 - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The AAO finds that although adjudication was withheld in the applicant case, she entered a plea of nolo contendere and was sentenced to imprisonment and probation meeting the definition of a conviction under section 101(a)(48) of the Act.

At the time of the applicant's conviction, Fl. Stat. § 812.014(2)(c) provided, in pertinent parts:

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

(2) . . .

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

(1) Valued at \$300 or more, but less than \$5,000. . . .

In *Matter of Silva-Trevino* the Attorney General adopted the "realistic probability" standard articulated by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), as an approach for determining inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. See 24 I&N Dec. 687, 698 (2008).

The methodology articulated by the Attorney General for determining whether a conviction is a crime involving moral turpitude requires an adjudicator to review 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. at 193). 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. . . ." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

Several U.S. Courts have distinguished the realistic probability test articulated in *Duneas-Alvarez* in cases where "a state statute explicitly defines a crime more broadly than the generic definition" and "no 'legal imagination,' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007)(citing *Duenas-Alvarez*, 127 S.Ct. at 822). In *United States v. Vidal*, the Ninth Circuit Court of Appeals determined that a "realistic probability" that the theft statute under which the alien was convicted would be applied to conduct that falls outside the generic definition of theft could be found in the plain text of the statute. 504 F.3d 1072, 1082 (9th Cir. 2007). The Ninth Circuit noted that "when '[t]he state statute's greater breadth is evident from its text,' a defendant may rely on the statutory language to establish the statute as overly inclusive." *Id.* (citing to *United States v. Grisel*, 488 F.3d at 850.).

In the instant case, the statute under which the applicant was convicted, Fl. Stat. § 812.014, involves both temporary and permanent takings. A plain reading of Fl. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. 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."). Therefore, the AAO cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, we will apply the modified categorical approach and engage in a second-stage inquiry by reviewing the record of conviction to determine if the conviction was based on conduct involving moral turpitude, and, if necessary, a third-stage inquiry by reviewing any other relevant evidence. *Silva-Trevino*, 24 I&N Dec. 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 record of conviction in this case includes the orders of supervision, the judgment of conviction, and the indictment. The record also contains an arrest affidavit.

The indictment in the applicant's case, dated January 5, 2001, and the charging affidavit, dated December 5, 2000, states that the applicant stole merchandise from the [REDACTED]. 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. Thus, the AAO finds that the applicant's crime was retail theft and the applicant was convicted of knowingly taking the property of another with intent to permanently deprive that person of the property, a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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 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 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). Therefore, 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)

The record of hardship includes: counsel's brief, the 2007 U.S. Department of State Country Report on Human Rights Practices for Cuba, a divorce decree, financial documentation, and education certificates for the applicant's children.

The AAO finds that the current record does establish that the applicant's children will suffer extreme hardship as a result of the applicant's inadmissibility. For a waiver under section 212(h) of the Act to be granted the applicant must show that his or her qualifying relative, in the applicant's case her two children, ages sixteen and ten years old, will suffer extreme hardship as a result of her inadmissibility to the United States.

In her brief, counsel states that the applicant is her children's only caregiver, their father is not involved in their lives, and there are no other family members who can care for the children. In addition, counsel states that the applicant's youngest child was born in the United States and her oldest moved to the United States when he was four years old. Counsel states that the children have been attending school in the United States and they are not fluent in the Spanish. She states further that the psychological pressure of moving to Cuba, a country with a very different standard of living and a different language, would cause extreme hardship for the applicant's children. The AAO notes that the applicant's statement, dated July 15, 2007, supports the statements made by counsel.

The AAO also notes that the record indicates, through the applicant's divorce decree, that the applicant has primary residential custody of her two children. The record indicates that the applicant's children are enrolled in school in the United States and are receiving good grades.

The AAO finds that in light of *In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001), cited above, the applicant's children would suffer extreme hardship as a result of relocation to Cuba because of their length of residence in the United States, their ages, and their inability to speak the Spanish language fluently. The AAO finds that separating these minor children from their mother and primary caregiver would be extreme hardship. Therefore, the

AAO finds that the record reflects that the applicant's children would suffer extreme hardship as a result of her inadmissibility.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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). The BIA has stated:

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 factor in the present case is the applicant's conviction for grand theft. The favorable factors in the present case are the extreme hardship to the applicant's children if she were to be denied a waiver of inadmissibility; the applicant's lack of a criminal record or offense since 2001; and, as indicated by school records and financial documentation, the applicant's record of employment and responsibility concerning her children.

The AAO finds that the crime committed by the applicant is serious in nature and 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. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.