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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

PUBLIC COPY

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FILE:

Office: PHILADELPHIA, PA

Date:

JUL 12 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.

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,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of The Bahamas who was found to be inadmissible to the United States under section 212(a)(2)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(B), for having been convicted of committing crimes involving moral turpitude. 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 her admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant filed a timely appeal.

On appeal, counsel states that the applicant married his wife on June 23, 2007, and that they have a close relationship. Counsel avers that the applicant's wife was born and raised in the United States, and has a close relationship with her family members, all of whom are U.S. citizens. Counsel indicates that the applicant's wife regularly visits her elderly mother, who resides in an assisted living home, and takes her shopping and to doctor appointments at least twice every week. Counsel indicates that the applicant's wife's 17-year-old son has an attention deficit disorder and lives with the applicant and his wife, and that her 26-year-old son is in prison and that she would suffer emotionally if she could no longer visit him. Further, counsel conveys that the applicant's wife's nine-year-old grandson is mentally retarded and her four-year-old grandson is autistic. Counsel avers that the applicant's wife will not be able to assist her daughters and grandchildren if she lived in The Bahamas. Moreover, counsel indicates that the applicant's wife has a close relationship with her sibling and extended family members.

Counsel contends that the applicant's wife would experience extreme hardship in The Bahamas due to its poor country conditions. Counsel maintains that the U.S. Department of State reports that there is discrimination in The Bahamas in employment, health care, and education. Furthermore, counsel indicates that the population in The Bahamas is approximately 307,451, and the unemployment rate is 7.6 percent. Counsel avers that the applicant's wife earns \$38,000 every year as a certified nursing assistant, and that it will be nearly impossible for her to obtain employment, "especially given her mental and physical disabilities." In addition, counsel states that police brutality occurs in The Bahamas.

Counsel states that the applicant's wife will be financially devastated if the applicant is removed from the United States because they both pay the household bills and are jointly responsible for the debt of \$24,000 for their vehicles. Moreover, counsel avers that the applicant's wife had hardship in her life such as the sudden death of her father when she was nine years old, depression and pregnancy when she was fourteen years old, and enduring mental and physical abuse from her first husband. Counsel declares that the applicant's wife is depressed and anxious about the potential loss of her husband, which is shown in [REDACTED]'s psychological evaluation. Lastly, counsel indicates that the applicant's wife had knee surgery for a fracture and torn cartilage and is undergoing physical therapy.

We will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing crimes 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 . . . 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 determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, makes a categorical inquiry, which consists of looking “to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute.” 582 F.3d 462, 465-66 (3rd Cir. 2009). This “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute “fits” within the requirements of a CIMT.” *Id.* at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The applicant has the following four convictions in Pennsylvania:

<u>Date of Conviction</u>	<u>Offense/Disposition</u>
• 12/23/1998	Tampering with or fabricating physical evidence Community service, probation, pay costs
• 07/31/2002	Resist Arrest/other law enforcement

1 to 12 months in Dauphin County Prison and credit for time served, immediate parole. No contact with [REDACTED]

- 01/14/2003 Retail theft-take merchandise
12 months probation, pay fine and costs
(on 11/09/2004 the judge revoked parole and ordered the balance of time of 6 months and 15 days be served, and enrollment in the laser program)
- 08/09/2004 Theft by unlawful taking-movable property
60 months probation, make restitution, pay costs and fine

The applicant was convicted under 18 Pa. Cons. Stat. § 3921(a), which states that “[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof.”

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.”). Further, we note that in *Matter of G-T-*, 4 I&N Dec. 446 (BIA 1951), the Board held that violation of a theft-conversion law in Texas involved moral turpitude because the criminal intent to deprive an owner of his property was an essential element of the statute, and that Texas courts held that the term “conversion” connotes that the goods, obtained through a bailment contract, when appropriated by the defendant to his own use, permanently deprived the owner of their enjoyment.¹ *Id.* at 448.

The AAO is unaware of any published federal cases addressing whether the crime of “theft by unlawful taking of movable property” under Pennsylvania law is a crime of moral turpitude. However, court cases in Pennsylvania are instructive in determining whether the offense is a crime involving moral turpitude.

The Penal Code in Pennsylvania does not define the offense of larceny. Pennsylvania courts have thus held that the common law definition applies. *Commonwealth v. Meinhart*, 173 Pa. Super. 495, 500-501, 98 A.2d 392 (1953). Under Pennsylvania law, larceny is “a specific intent to steal . . . an

¹ Article 1429 of Vernon's Annotated Penal Code of Texas provides as follows:

Theft-Conversion by bailee.-Any person having possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use with intent to deprive the owner of the value of the same, shall be guilty of theft . . .

intent to convert the goods wrongfully to the taker's own use or permanently deprive the owner of their possession.” *Id.* (citing *Commonwealth v. Doran*, 145 Pa. Super. 173, 20 A.2d 815 (1941). *See also Hilliard Lumber Co. v. Harleysville Co.*, 175 Pa. Super. 94, 96, 103 A.2d 436 (1954) (larceny is meant “in its common-law sense. . . . the taking and carrying away of the personal property of another with the mind of a thief, that is, with the specific intent to deprive the owner permanently of his property.”); and *Commonwealth v. Lyons*, 219 Pa. Super. 18, 22, 280 A.2d 458 (1971) (the offense of larceny has the common law definition and is “the taking and carrying away of the personal property of another with the mind of a thief, that is, with the specific intent to deprive the owner permanently of his property.”)

Further, in *Commonwealth v. Nace*, 222 Pa. Super. 329, 295 A.2d 87 (1972), the court analyzed whether joy-riding in Pennsylvania, which is essentially the taking of “someone else's car without permission for the pleasure of driving it temporarily, but with no intent to deprive the owner of permanent possession,” is a larceny offense (larceny of a motor vehicle). *Id.* at 331-332. The court found that joy-riding qualifies as a larceny offense since the elements of the lesser offense of joy-riding are included in the greater offense of larceny of a motor vehicle. However, the court indicated that lack of intent to deprive of permanent possession is a defense to larceny of a motor vehicle. *Id.*

In sum, the elements that must be proven for a conviction under section 3921(a) include an intent to permanently deprive the owner of their possession or an intent to convert the goods wrongfully to the taker's own use. In view of the holdings in *Matter of G-T-* and *Grazley*, which are that there must be an intent to permanently deprive the owner of his property and that the unlawful conversion of property is to permanently deprive the owner of his property, the AAO finds that the Pennsylvania offense of “theft by unlawful taking of movable property” constitutes a crime involving moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was also convicted under title 18, section 3929(a)(1) of the Pennsylvania Consolidated Statutes of retail theft. The section states:

(a) Offense defined.--A person is guilty of a retail theft if he:

(1) takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof . . .

In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board found that violation of 18 Pa. Cons. Stat. § 3921 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, in light of *Jurado* and the foregoing discussion of Pennsylvania law, we find the applicant's retail theft in violation of 18 Pa. Cons. Stat. § 3921(a) involves moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The AAO has found that the applicant's theft offenses involve moral turpitude, rendering him inadmissible under section 212(a)(2)(A)(i)(I) the Act. Thus, we need not address whether the

applicant's offenses of resisting arrest and tampering with or fabricating physical evidence are crimes involving moral turpitude.

Section 212(h) of the Act provides a waiver for inadmissibility. 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. 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).

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.

In rendering this decision, the AAO will consider all of the evidence in the record, which consists of letters, a psychological evaluation, financial records, a U.S. Department of State report on the Bahamas, a physical therapy re-evaluation, and other documentation.

The record contains letters by the applicant’s wife. The applicant’s wife states in the letter dated September 27, 2008 that her husband has changed and is employed at the Salvation Army, where he previously volunteered every Thursday. She states that he is involved church activities and is well-respected. The applicant’s wife avers that her children have a close relationship with the applicant, especially her youngest son, with whom the applicant is a mentor.

In an undated letter the applicant’s wife states that her husband is “a big part of her life, we have a good life.” She indicates that her prior husband was abusive, that she often thought about killing herself, and that she was depressed for years. She states,

I was seeing a psychiatrist, my family doctor and I was on medication for anxiety and depression, I was a total mess. Then I had to deal with my oldest son getting into trouble, doing drugs, selling drugs and stealing cars, he was in and out of group homes then progress[ed] to prison and is still in prison right now for drugs and guns [sic] charges.

The applicant's wife also declares that she met the applicant three years after separation from her ex-husband. She states that the applicant "brought peace and stability to my other wise [sic] miserable life, he gave me love and he love [sic] my son." The applicant's wife conveys that her son Rayshawn embraces the applicant like a father. She describes the applicant's help while she underwent knee surgery and rehabilitation. She asserts that, "I adore my husband and I need his love and support. I finally found someone who gave me something to live for and I am happy, we have our disagreement just like everyone else, but we handle it and move on." She avers, "being without his love and support will cause great hardship and pain on me, I know I will have to seek treatment and medication."

The record also contains letters about the applicant. The director of program and residential services with [REDACTED] Pennsylvania, states in the letter dated July 22, 2008, that the applicant has been a volunteer driver assisting residents to attend church-based recovery meetings. The director further states that the applicant has been employed as a resident manager since July 9, 2008, is responsible for supervising 64 residents, upholding program standards and monitoring the safety of the facility.

Also, the letter by [REDACTED] dated September 19, 2008 conveys that he has known the applicant for ten years, since the applicant came to the Bethesda mission for an addition program. He avers that he was the employment counselor for the program in which the applicant was enrolled, and after observing the applicant for several years, asked him to be his assistant. [REDACTED] states, "I have remained friends with him through the good times and bad. Within the past three years, he has made an extreme change in his lifestyle. He attends church regularly and he met a very nice woman whom he married last year."

In addition, the letter by [REDACTED] dated September 30, 2008 declares that she attended the applicant's wedding and observed his courtship with his wife. She states that the applicant "treats his wife like a lady and is deeply devoted to her. [REDACTED] has taken on the role of step-father and step-grandfather very well. It is a picture of contentment to see his litter step-grandson asleep with his head nestled on Aaron's shoulder and his arms around his neck."

Finally, [REDACTED] pastor with [REDACTED], states that he is the applicant's minister and has known him for five years. [REDACTED] conveys that he counseled the applicant through serious problems and "met him at a very low point in his life. I want you to know that Aaron has made grave mistakes, for which he served time. But, he is not the same man. He has grown through his mistakes and has become a man of outstanding character." [REDACTED] avers that he married the applicant and his wife. He declares that the applicant's wife needs the applicant, and that the applicant is "giving back to others at the Salvation Army who are having similar problems to what he experienced."

[REDACTED] psychological hardship evaluation dated January 28, 2009 describes events in the applicant's wife's life such as her father's death, her adolescent pregnancy, her abusive marriage, her history of depressive episodes in which she quit working and supported herself and her children through welfare benefits, and her present depressive period of contemplating the possibility of her

husband's removal [REDACTED] contends that the applicant provides emotional support to his wife, and she in turn is supportive towards her mother, and sons, daughters, and grandchildren.

Furthermore, [REDACTED] conveys that the applicant's wife works as a certified nurse assistant, an occupation with a high rate of physical injuries, has undergone knee surgery in October 2008, and has shoulder problems. We note that the physical therapy re-evaluation conveys that the applicant's wife had knee surgery in October 2008. [REDACTED] asserts that the applicant would be able to provide financial assistance if his wife becomes disabled or requires extended leave to convalesce from future injuries or surgeries. [REDACTED] also contends that the applicant's wife would not be able to pay her medical bills and other expenses if the applicant is deported. [REDACTED] conveys that the applicant's husband has a bachelor's degree in accounting and is employed in a menial position because he had to overcome legal and drug problems.

In addition, [REDACTED] states that the applicant's wife would likely have significant difficulty finding a job in The Bahamas in view of its 8.7 percent unemployment rate in 2008. Moreover, [REDACTED] states that she will be separated from her family members in the United States. [REDACTED] avers that she will endure the emotional hardship of being unable to visit her son in prison; to help her mother (who lives in a retirement home); to provide a home for [REDACTED] to assist her [REDACTED] who lives nearby, and whose 4-year-old son is autistic; and to assist her daughter in North Carolina, whose 9-year-old son has mental retardation. Lastly, [REDACTED] diagnoses [REDACTED] with attention deficit disorder, and avers that [REDACTED] is likely to experience distress and possibly clinical depression in separation from the applicant. We note that the applicant's wife's income tax records for 2004 show that Shavonna, and Shavonna's child were her dependents.

The stated hardships to the applicant's wife if she remains in the United States without her husband are emotional and financial in nature. [REDACTED] evaluation provides a detailed account of the applicant's wife's history, showing that she had periods of depression while in an abusive marriage with her first husband. [REDACTED] indicates that the applicant emotionally supports his wife while she carries out family responsibilities towards her mother and adult children. The applicant's wife declares that she has a close relationship with the applicant, to whom she depends on for moral support while she assists her sons, daughters, grandchildren, and mother. Letters in the record by a pastor and by friends substantiate the close relationship of the applicant and his wife. However, none of the submitted letters convey that the applicant's wife copes with any hardships, such as taking care of her disabled mother, visiting her son in prison, and assisting with grandchildren with disabilities. Moreover, no documentation is in the record of the disabilities of the applicant's grandchildren and mother. Further, though the applicant's wife had knee surgery in 2008, the potential for recovery was categorized as excellent. Lastly, the evidence of invoices in the record is not sufficient to demonstrate that the applicant's wife's income is not enough to pay her expenses. Thus, in view of the lack of evidence in the record, we find that when the hardship factors are considered together, they fail to demonstrate that the applicant's wife would experience extreme emotional hardship if she remains in the United States without him.

In addition, though [REDACTED] conveys that the applicant's wife will experience emotional hardship if she joins the applicant to live in The Bahamas and is no longer able to fulfill her family responsibilities towards her mother and adult children, there is no evidence in the record of her mother and grandchildren's problems and of her son's incarceration. Further, we note that

Rayshawn is no longer a minor, and, thus, we will not presume that he is as emotionally and financially dependent on his mother and stepfather. Lastly, the Central Intelligence Agency reports that The Bahamas is one of the wealthiest Caribbean countries, its gross domestic product per capita is \$29,900, and its unemployment was 7.6 percent in 2006. *The World Factbook 2009*. Washington, DC: Central Intelligence Agency, 2009. In light of these facts, we find that the applicant has not demonstrated that he and his wife would be unable to obtain employment in The Bahamas for which they are qualified, ensuring a decent standard of living. We note that the applicant has a bachelor's degree in accounting and his wife is a certified nursing assistant. Thus, we cannot find that when the hardship factors are considered collectively, they demonstrate the hardship that his wife will experience as a result of living in The Bahamas is extreme.

The applicant fails to establish extreme hardship to a qualifying relative under section 212(h) of the Act.

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 not met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

ORDER: The appeal is dismissed.