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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]

H2

Date: JUL 13 2011 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B) and section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF PETITIONER:

[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.

Thank you,

Michael Humway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Bangladesh who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and who is seeking readmission within ten years of his last departure from the United States. The applicant was also found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for being convicted of crimes involving moral turpitude. The applicant is married to a U.S. citizen and has a U.S. citizen child. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision, dated March 3, 2008, the director found that the evidence in the record did not demonstrate that the refusal of the applicant's admission to the United States would cause extreme hardship to his spouse and daughter. The application was denied accordingly.

In a brief submitted on appeal, counsel states that the applicant has established eligibility for a section 212(h) waiver, that his wife and child are U.S. citizens, and that the applicant has established that he has significant family ties, business ties, and evidence of rehabilitation.

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.
>
> * * *

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 –
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
>
> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

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 *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.

The record reflects that on January 4, 1993 in Los Angeles County, California the applicant was convicted of theft, unauthorized use of a credit card, in violation of section 484e of the California Penal Code (Cal. Penal Code) and was sentenced to two years probation.

Section 484e of the Cal. Penal Code states:

> (a) Every person who, with intent to defraud, sells, transfers, or conveys, an access card, without the cardholder's or issuer's consent, is guilty of grand theft.
>
> (b) Every person, other than the issuer, who within any consecutive 12-month period, acquires access cards issued in the names of four or more persons which he or she has reason to know were taken or retained under circumstances which constitute a violation of subdivision (a), (c), or (d) is guilty of grand theft.
>
> (c) Every person who, with the intent to defraud, acquires or retains possession of an access card without the cardholder's or issuer's consent, with intent to use, sell, or transfer it to a person other than the cardholder or issuer is guilty of petty theft.
>
> (d) Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft.

The AAO notes that any crime involving fraud is a crime involving moral turpitude. *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965), *cert denied*, 383 U.S. 915 (1966). Thus, the applicant's conviction under Cal. Penal Code section 484e is a crime involving moral turpitude.

The record reflects that on October 8, 1995 in Harris County, Texas the applicant was convicted of failure to stop and give information after an accident as a misdemeanor and sentenced to180 days in prison and one year probation.

Section 550.022 of the Texas Transportation Code states, in pertinent part:

> (a) Except as provided by Subsection (b), the operator of a vehicle involved in an accident resulting only in damage to a vehicle that is driven or attended by a person shall:
>
> > (1) immediately stop the vehicle at the scene of the accident or as close as possible to the scene of the accident without obstructing traffic more than is necessary;

> (2) immediately return to the scene of the accident if the vehicle is not stopped at the scene of the accident; and
>
> (3) remain at the scene of the accident until the operator complies with the requirements of Section 550.023.

Although the U.S. Court of Appeals for the Fifth Circuit has held that failure to stop and render aid following a fatal auto accident in violation of Texas law is a crime involving moral turpitude, *see Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007), the applicant's conviction is for a misdemeanor which only resulted in property damage. This conduct does not reflect the "inherently base, vile, or depraved," behavior found in moral turpitude offenses. *Perez-Contreras*, 20 I&N Dec. at 617-18. Further, a violation of this section of the Texas Transportation Code does not require evil intent. The BIA has held that the malicious destruction of property is not a crime involving moral turpitude when the statute under which the alien was convicted does not require base or depraved conduct. *See Matter of M*, 2 I&N Dec. 686 (BIA 1946)(unlawful destruction of railway telegraph equipment found not to involve moral turpitude); *Matter of C-*, 2 I&N Dec. 716 (BIA 1947)(no moral turpitude in damaging a glass door of private property); *Matter of B*, 2 I&N Dec. 867 (BIA 1947)(willfully damaging mailboxes and other private property found not to involve moral turpitude). Accordingly, there is no basis to find that moral turpitude inheres in this misdemeanor conviction.

The record also reflects that on August 7, 1998 in Harris County, Texas the applicant was convicted of felony theft for property valued over $1,500 but under $20,000 for events that occurred on or about December 4, 1997. The criminal complaint in the applicant's case, dated December 5, 1997 states that the applicant stole property (eighteen cases of cigarettes, one camcorder, and one compact disc player), which was in the custody of the Houston Police Department and which had been explicitly represented to the applicant by a law enforcement agent as being stolen. The applicant was sentenced to four years probation, was fined, and was ordered to serve 300 hours of community service.

Texas Penal Code § 31.03 states, in pertinent part:

> (a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.
>
> (b) Appropriation of property is unlawful if:
>
> ...
>
> (3) property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another.
>
> (e) Except as provided by Subsection (f), an offense under this section is:
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> ...
>
> (4) a state jail felony if:

> (A) the value of the property stolen is $1,500 or more but less than $20,000...

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."). In *Griffin v. State* (Cr.App. 1981) 614 S.W.2d 155, the court found that a theft conviction under Texas Penal Code § 31.03 cannot be obtained on proof that a defendant intended only a temporary withholding of the property. In addition, the court held in *Vargas v. State* (App. 14 Dist. 1991) 818 S.W.2d 875, that stolen property does not lose its character as stolen when it is recovered by law enforcement agent and, when defendant obtains the property from an undercover officer who pawns it to him for sixty days in a sting operation, the issue is not whether he intended to withhold the property from the police officer permanently or temporarily but whether, having been told that property is stolen, he intended to permanently deprive the true owner of the property. Thus, in proving an intent to deprive, a conviction under Texas Penal Code § 31.03 requires prove that the defendant intended to permanently deprive the owner of his or her property. The AAO finds that in being convicted under Texas Penal Code § 31.03 and Cal. Penal Code section 484e the applicant has been convicted of two crimes involving moral turpitude and is inadmissible under Section 212(a)(2)(A) of the Act and requires a waiver of this ground of inadmissibility under section 212(h) of the Act. As the applicant's conviction under Texas Penal Code § 31.03 occurred less than 15 years ago, the applicant is only eligible for consideration of a waiver under section 212(h)(1)(B) of the Act and not section 212(h)(1)(A) of the Act.

The AAO notes that the applicant is also inadmissible under section 212(a)(9)(B) of the Act. The record indicates that on August 20, 1990 the applicant entered the United States on a B2 visitor's visa. The applicant remained in the United States until May 2003. Therefore, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions were enacted until May 2003. In applying for an immigrant visa, the applicant is seeking admission within ten years of his May 2003 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> . . . .
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

. . . .

> (v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Sections 212(a)(9)(B)(v) and 212(h) waivers of the bar to admission are dependent upon a showing that the bar imposes an extreme hardship on a qualifying family member. The only qualifying family member in both section 212(a)(9)(B)(v) and 212(h) waivers is the applicant's spouse, as the applicant's child is not a qualifying family member for a section 212(a)(9)(B)(v) waiver. Thus, extreme hardship to the applicant's spouse must be established to overcome both of the applicant's inadmissibilities. 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-Moralez,* 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, a statement from the applicant's spouse, a statement from a social worker, photographs and medical documentation regarding a household accident and the applicant's spouse, documentation related to the applicant's child's enrollment in school, other medical documentation, country condition information, and letters regarding the applicant's good moral character.

In her statement, the applicant's spouse states that they are currently living in Canada where the applicant has a pending permanent residence application, but that neither she nor her daughter can derive an immigration status from his application. She states that she and the applicant owned two businesses in the United States, which they had when they came to Canada because she could not manage the businesses without her husband in the United States. She also states that she is not able to have a job in the United States because she spends long periods of time in Canada with the applicant because she does not want her daughter to become estranged from her father. She states that her daughter will soon start school in the United States and they will no longer be able to visit the applicant in Canada for such long periods of time. She states that she is constantly nervous, anxious, and worried about splitting up her family.

An affidavit, dated September 9, 2006, from a [redacted] in Houston Texas, states that without the support system of the applicant in the United States, the applicant's spouse is suffering mentally, physically, and emotionally. [redacted] states that the applicant's absence is impacting his spouse's ability to parent their daughter and that his spouse will become a financial burden to society without the applicant. [redacted] also states that the applicant's spouse feels it would be a terrible burden to return to Bangladesh. In her affidavit, [redacted] describes the applicant's spouse's difficult past, in that she moved to the United States in 1998 from Bangladesh with her husband to find out that he had a girlfriend. She then divorced and worked

menial jobs until she met the applicant. states that the applicant and his spouse had their daughter out of wedlock, which has caused the applicant's spouse to be ostracized from her family in Bangladesh and her community in Houston. states that the applicant's spouse and daughter live with the applicant's friend's family in a cramped two bedroom apartment. also describes a disfiguring burn that the applicant's spouse suffered when she had a household accident with cooking oil. states that in 2006, the applicant's spouse suffered a horrific burn which runs from her right hip, spreading over her chest and covering both breasts. The AAO notes that the record contains photographs and medical documentation regarding the injury suffered by the applicant's spouse.

The AAO also notes that the record includes a 2005 U.S. State Department Report on Human Rights Practices in Bangladesh and an op-ed article, dated March 6, 2006, in the *Financial Express*, entitled "Macro-econometric Model of Bangladesh economy." The AAO notes that the article and the report give generalized information regarding Bangladesh's problematic economy and poor human rights record without giving specific information about the situation the applicant's spouse would face as a result of relocating. The AAO does note that the human rights report states that there were several incidents of violence involving radical Muslim groups in Bangladesh and that domestic violence against women was widespread. The report states that much of the reported violence against women was related to disputes over dowries and that there were 227 dowry related killings that year. The report also states that incidents of vigilantism against women, sometimes led by religious leaders had occurred with acid attacks being a serious problem. Finally, the report states that women remain in a subordinate position in society and that the government does not act effectively to protect their basic rights.

The AAO finds that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility. The AAO notes that because the record has not established whether the applicant has the right to permanently reside in Canada, the AAO cannot conclude that Canada is a possible relocation country for the applicant and his family. The AAO finds that the applicant would suffer extreme hardship as a result of relocating to Bangladesh. The record indicates that the applicant's spouse came to the United States with her first husband, whom she divorced. She then had a child with the applicant before marrying, which caused her to be ostracized from her Muslim family in Bangladesh. Given these factors and the report on human rights practices in Bangladesh, specifically human rights abuses against women, the AAO finds that the applicant's spouse will suffer extreme hardship as a result of relocation.

The AAO also finds that the applicant's spouse is suffering economically and emotionally as a result of being separated from the applicant and having to raise her now nine year old daughter on her own. As stated above, the applicant's spouse has no family in the United States to help support her and is currently relying on the applicant's friends for a place to live. In addition, the applicant's spouse has been forced to give up ownership of two businesses as a result of the applicant's inadmissibility. Thus, the AAO finds that the applicant's spouse is suffering extreme hardship as a result of being separated from the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec.

582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's convictions in 1993 and 1998 and his illegal residence in the United States for over ten years, including six years of unlawful presence.

The favorable factors in the present case are the extreme hardship to the applicant's U.S. citizen spouse and hardship to the applicant's U.S. citizen daughter if he were not granted a waiver of inadmissibility; the lack of any criminal record since 1998; and the applicant's good moral character as evidenced by nine letters from friends and colleagues submitted on the applicant's behalf.

The AAO finds that the crimes and immigration violations committed by the applicant are 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.