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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
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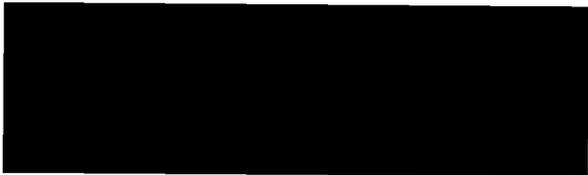
Date: Office: LOS ANGELES FILE:

JUL 20 2011

IN RE: Applicant:

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.

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, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his lawful permanent resident parents.

The field office director found that the applicant failed to establish that denial of the present application will result in extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated September 8, 2008.

On appeal, counsel for the applicant asserts that the applicant's mother will endure extreme hardship should the applicant be prohibited from residing in the United States. *Statement from Counsel on Form I-290B*, dated October 2, 2008.

The record contains, but is not limited to: a brief from counsel; a copy of the applicant's ministry license; statements from the applicant, the applicant's mother, and the applicant's pastor; a psychological evaluation of the applicant's mother; documentation in connection with the applicant's training and employment; tax and mortgage documents for the applicant and his mother; and documentation relating to the applicant's criminal convictions. The entire record was reviewed and considered in rendering this decision.

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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero, supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise what has become known as the record of conviction—the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment—to determine if the conviction entailed admission to, or proof of, the necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)).

On June 3, 1998, the applicant was convicted in California of Grand Theft of Private Property over \$400 under Cal. Penal Code § 487(a) and Malicious Computer Credit System under Cal. Penal Code § 502(c). He was sentenced to 16 months of incarceration.

At the time of the applicant's conviction, Cal. Penal Code § 487(a) stated that "[g]rand theft is theft committed . . . [w]hen the money, labor, or real or personal property taken is of a value exceeding four hundred dollars (\$400)" "Theft" is defined by Cal. Penal Code § 484(a), which at the time of the applicant's conviction read:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, "Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].") However, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Ninth Circuit Court of Appeals addressed the issue of whether Cal. Penal Code § 484(a) constitutes a crime involving moral turpitude in *Castillo-Cruz*. See 581 F.3d at 1157. The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a), and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). Therefore, the AAO finds that a conviction for Grand Theft of Private Property over \$400

under Cal. Penal Code § 487(a) is categorically a crime involving moral turpitude because it requires the permanent intent to deprive the victim of his or her property.

The record of the applicant's conviction indicates that he was sentenced to 16 months of incarceration for his conviction under Cal. Penal Code § 487(a). As the applicant does not potentially meet the "petty offense" exception found in section 212(a)(2)(A)(ii)(II) of the Act, the AAO need not also examine whether the applicant's conviction for Malicious Computer Credit System under Cal. Penal Code § 502(c) constitutes a crime involving moral turpitude. The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act and he requires a waiver under section 212(h) of the Act.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

(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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

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 mother and father 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).

In a statement dated September 11, 2007, the applicant provided that his employment allows him to assist his family financially. He stated that his mother was diagnosed with diabetes and hypertension and that he helps her pay for doctor's visits and medication. He added that he takes his mother to medical appointments and refills her prescriptions. He stated that his younger brother married in 1997 and that he has a separate life from their family. He noted that his brother must support his wife and child, thus he does not have "expendable income." He indicated that his father was the family's primary income earner, but that age and physical maladies have "slowed [him] down." The applicant explained that his father suffers from gout and that often he cannot walk and misses work. He added that his father intended to retire which would reduce the income his family would earn. The applicant stated that he will continue to help pay the mortgage on the family's home. The applicant expressed concern for his mother's mental health should he be deported because she has suffered from depression and becomes very upset.

In a statement dated September 10, 2007, the applicant's mother expressed that she and the applicant have always been very close. She explained that she began having chronic depression and acute anxiety when the applicant began to have legal problems in 1998. She stated that she stopped working as a food preparer at an airport after the applicant's criminal case began. She noted that she saw a therapist for psychological help for six months beginning in 1999. She provided that she was occasionally able to work as a housekeeper until 2000 but she has been unemployed since. She added that her doctor informed her that stress and acute anxiety contributed to her development of diabetes and hypertension. She stated that she does not have health insurance, and that she would be unable to afford her medical care and medications without the applicant's assistance. She provided that her younger son is unable to assist her financially. She noted that her husband works for BCI Telecommunications yet he does not earn much. She explained that the majority of her husband's income is used to pay the mortgage on their home. She expressed that the applicant's possible departure is causing her significant emotional distress, and that they have no family or support system in Nicaragua.

In a statement dated April 5, 2000, the applicant's mother expressed concern for the applicant's experience in Nicaragua, as he would lack employment and educational opportunities, and because he has resided in the United States since he was 10 years old. She asserted that she and the applicant's father would be unable to visit the applicant in Nicaragua. She described her symptoms since the applicant began having difficulty, and she stated that the applicant's father's medical insurance does not cover mental health services for her. She noted that she was taking care of her younger son's child during the day, and that the applicant's father was working two shifts as a gas-pipe layer. She indicated that the applicant assisted them financially.

The record contains a letter from a Marriage and Family Therapist, [REDACTED], dated May 13, 2000, that provides that the applicant's mother sought counseling for depression on April 22, 2000, and that her mental health condition was dependent on the applicant's situation.

The applicant submits a psychological evaluation for his mother, conducted by [REDACTED] dated September 11, 2007, in which [REDACTED] described the applicant's mother's history and diagnosed her with Depressive Disorder and an Anxiety Disorder. [REDACTED] posited that the applicant's mother's symptoms will worsen if the applicant is compelled to return to Nicaragua. [REDACTED] indicated that the applicant's mother previously suffered mental health symptoms when the applicant was jailed for his criminal activity, but that she recovered when he returned home. [REDACTED] added that the applicant's mother is married and has two brothers, three sisters, and two children.

Counsel asserts that the applicant's mother will suffer financial and emotional hardship if the waiver application is denied. Counsel states that the applicant's mother was treated for six months for depression, and that she continues to receive treatment at the present time. Counsel contends that the field office director failed to place sufficient emphasis on the applicant's mother's mental health challenges. Counsel provides that there is no evidence in the record that shows the applicant's younger brother is willing or able to assist the applicant's family.

Upon review, the applicant has not shown that denial of the present waiver application "would result in extreme hardship" to a qualifying relative, as required by section 212(h) of the Act. The applicant's mother and father are lawful permanent residents in the United States. The applicant has not asserted, and the record does not support, that his father will suffer extreme hardship should the applicant reside outside the United States. The applicant's mother expressed concern for the applicant's challenges in Nicaragua, yet the applicant has not presented explanation or evidence to show whether his mother would face hardship should she relocate to Nicaragua with him. In the absence of clear assertions from the applicant, the AAO may not speculate as to hardships the applicant's relatives may face. In proceedings regarding a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361.

The applicant asserts that his mother will face hardship should he return to Nicaragua and she remain in the United States. The applicant's mother states that she relies on the applicant's financial support. However, the record lacks a recent accounting or supporting documentation to show his mother's expenses or financial resources. The record contains references to the applicant's father's employment, yet no documentation to show his present income. While the applicant discussed his father's health problems that impact his employment, the applicant has not provided any medical documentation to support these assertions. Nor has the applicant submitted any evidence to show that he pays for his mother's medical needs as claimed. The applicant's mother provided that the applicant's father's health insurance does not pay for her mental health care, which suggests that his health coverage does pay for her physical health care. Accordingly, the applicant has not shown by a preponderance of the evidence that his mother will suffer significant financial difficulty in his absence.

The AAO has carefully examined the reports in the record regarding the applicant's mother's mental health challenges. It is evident that the applicant's mother shares a close relationship with the

applicant and that she is affected by his legal troubles and potential departure from the United States. Her history of suffering mental health consequences associated with the applicant's struggles extends beyond the present application for a waiver. While the applicant has demonstrated his mother's mental health challenges, he has not provided any evidence of her claimed physical health problems. He has not shown that his mother has received follow-up care or counseling related to her mental health. There is no documentation in the record that confirms she requires or receives prescription medication. Nor has the applicant indicated whether his mother receives emotional support from her two brothers, three sisters, husband, or other son. The AAO considers diagnosed depression and anxiety to be serious conditions that contribute to the hardship of a qualifying relative. Yet, the AAO must examine all elements of hardship presented by the applicant in aggregate. In the present matter, the applicant has not established that his mother's emotional suffering rises to an extreme level. He has not shown that his mother faces other significant elements of hardship that, when combined with her emotional challenges, elevate her hardship to an extreme level.

Based on the foregoing, the applicant has not shown that his mother or father will suffer extreme hardship should the present waiver application be denied. As such, no purpose would be served in assessing whether the applicant has shown that he merits a waiver as a matter of discretion.

As noted above, in proceedings regarding a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.