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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**

H₂

FILE:

Office: MIAMI, FLORIDA

Date: JUN 07 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,

A handwritten signature in cursive script, appearing to read "Michael Hummer".

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Cuba 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 contends that the waiver of inadmissibility is not required in the instant case. Counsel states that in 2004 the applicant was charged with fraudulent use of a credit card, third degree grand theft, and petit theft in case number [REDACTED]; and in case number [REDACTED] she was charged with burglary of a structure or conveyance, fraudulent use of a credit card, and third degree grand theft. Counsel asserts that in both cases the judge withheld adjudication of guilt in the third degree grand theft charges, and dismissed all the other charges. Counsel indicates that the applicant was sentenced to serve 18 months probation, which was to run concurrently for each charge. Counsel declares that grand theft of the third degree in violation of section 812.014(2)(c)(1) of the Florida Statutes is not a crime involving moral turpitude.

Counsel states that the applicant's only other conviction is for carrying a concealed firearm, which resulted in withholding of adjudication and probation. Counsel cites *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979), and contends that the Board of Immigration Appeals (Board) found that carrying a concealed firearm is not an offense involving moral turpitude. We note that counsel asserts that all charges against the applicant were dismissed from the arrest on August 3, 1996.

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.
- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
 -
 - (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 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 reflects that in the Sixteenth Judicial Circuit Court, Monroe County, Florida, on August 7, 2007 the applicant pled guilty to grand theft of the third degree in violation of section 812.014(2)(c)(1) of the Florida Statutes in two separate cases: case number [REDACTED] and case number [REDACTED]. For each case, the judge entered an order withholding adjudication of guilt, and placed the applicant on probation for a period of 18 months.

The record also reflects that in the Eleventh Judicial Circuit Court, Miami-Dade County, Florida, on June 9, 1988, the applicant was charged with carrying a concealed weapon in violation of Fl. Stat. § 790.01. The judge ordered the withholding of adjudication of guilt, and placed the applicant on probation for a period of one year.

At the time of the applicant's conviction, Fl. Stat. § 812.014(2)(c)(1) 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. . . .

On appeal, counsel cites *Jaggernaut v. U.S. Atty. Gen'l*, 432 F.3d 1346, 1352-56 (11th Cir. 2005), and states that the Court found that Fl. Stat. § 812.014 is a divisible statute that includes the intent to either temporarily or permanently take the property of another. Further, counsel states that in *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973), the Board held that theft involves moral turpitude only when a permanent taking is intended. Counsel argues that because the applicant was convicted under a divisible statute that includes intent of both permanent and temporary taking, the modified categorical approach must be applied, which entails looking at the applicant's record of conviction to determine whether a permanent taking was intended. Counsel states that the charging document does not convey whether the applicant intended a permanent taking of property. Counsel argues that in the absence of a permanent taking, as a matter of law it cannot be concluded that the crime of which the applicant was convicted involves moral turpitude.

The AAO notes that in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

In the instant case, we agree that 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. Furthermore, we agree with counsel that in view of *Grazley* a theft offense must require the intent to permanently take another person's property for the offense to involve moral turpitude. Therefore, the AAO cannot find that violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

However, 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. *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 for case number [REDACTED] includes the "Information," which reflects that the applicant was charged with the following:

[REDACTED] on or about May 15, 2004 . . . did knowingly obtain or use, or endeavor to obtain or use merchandise of a value or \$300.00 or more, which was the property of CVS Pharmacy formerly known as Eckerd Drug's, or any other person not the defendant(s), with the intent to permanently or temporarily deprive CVS Pharmacy formerly known as Eckerd Drug's or any other person not the defendant(s) of the property or benefit therefrom or to appropriate the property to the use of [REDACTED] or to the use of any person not entitled thereto, contrary to Florida Statute 812.014(1) and (2)(c). (3 DEG FEL)

Also, the "Information" for the record of conviction for case number 2004-CF-00274-A-P states that the applicant was charged with the following offense:

[REDACTED] on or about May 15, 2004 . . . did knowingly obtain or use, or endeavor to obtain or use various goods and/or merchandise of a value or \$300.00 or more, which was the property of CVS Pharmacy formerly known as Eckerd Drugs, or any other person not the defendant(s), with the intent to permanently or temporarily deprive CVS Pharmacy formerly known as Eckerd Drug's or any other person not the defendant(s), with the intent to permanently or temporarily deprive CVS Pharmacy formerly known as Eckerd Drugs or any other person not the defendant(s) of the property or benefit therefrom or to appropriate the property to the use of Caridad Molina or to the use of any person not entitled thereto, contrary to Florida Statute 812.014(1) and (2)(c). (3 DEG FEL)

In *In re Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board found that violation of a Pennsylvania retail theft statute involves 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.

We find that the reasoning in *Jurado-Delgado* is applicable to the instant case, and that based on the evidence in the record, the applicant's crimes were retail theft. The applicant was thus 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.

With regard to the offense of carrying a concealed weapon, Fl. Stat. § 790.01 states the following:

- (1) Whoever shall carry a concealed weapon or electric weapon or device on or about his person shall be guilty of a misdemeanor of the first degree . . .
- 2) Whoever shall carry a concealed firearm on or about his person shall be guilty of a felony of the third degree . . .

On appeal, counsel contends that the applicant's conviction for carrying a concealed weapon is not a crime involving moral turpitude in view of *Granados*, which states that a conviction for possession of a concealed sawed-off shotgun is not a crime involving moral turpitude. 16 I&N Dec. 726, 728 (BIA 1979).

However, in *Matter of S-*, the Board held that carrying a concealed and deadly weapon with intent to use against the person of another is a crime involving moral turpitude because "the use of a dangerous weapon against the person of another is motivated by an evil, base, and vicious intent. The essence of the offense is the carrying of the dangerous weapon with a base, evil and vicious intent to injure another." 8 I&N Dec. 344, 346 (BIA 1959)(citations omitted).

The AAO is unaware of any published federal cases addressing whether the crime of carrying a concealed weapon under Florida law is a crime of moral turpitude. However, we observe that the applicant was convicted under Fl. Stat. § 790.01, which pertains only to the carrying of a concealed weapon, and thus lacks the evil, base, and vicious intent to injure another as described in *Matter of S-*. Moreover, we note the existence of laws in Florida for having a weapon "while committing or attempting to commit any felony" (Fl. Stat. § 790.07) and assault (Fl. Stat. § 784.011). Consequently, we find that the applicant's conviction under Fl. Stat. § 790.01 would not be a crime involving moral turpitude.

Nevertheless, we have found the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed crimes involving moral turpitude.

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 section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives in this case are the applicant's U.S. citizen son and daughter. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Moralez*, 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*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *In re Bing Chih Kao*

and Mei Tsui Lin, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

In rendering this decision, the AAO has considered all of the evidence in the record, which consists of letters and other documentation.

With regard to remaining in the United States without the applicant, the applicant states in the letter dated November 22, 1999, that she has son and daughter, that they are a united family and that they will be separated from her if the waiver application is denied. The stated hardships are the separation of the applicant's son and daughter from the applicant. The record reflects that the applicant's son was born on August 3, 1979 and her daughter was born on March 14, 1978. In view of the ages of the applicant's son and daughter, we find that the emotional hardship associated with separation from their mother is distinguishable from that of minor children who are more financially and emotionally dependent upon a parent. Thus, we cannot find that the applicant has demonstrated the hardship that her son and daughter will experience as a result of separation is extreme.

The applicant states that she cannot live in Cuba because there is no freedom there, and she would be alone and will struggle to find food, shelter, and employment. However, as previously stated, 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 her son and daughter. Thus, we find the applicant has failed to demonstrate extreme hardship to her son and daughter if they joined her to live in Cuba.

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.