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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: CHICAGO, ILLINOIS Date: **JUN 08 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.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Honduras 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 his 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 denial of the waiver applicant was an abuse of discretion. Counsel asserts that the hardship factors in their totality demonstrate extreme hardship to the applicant's husband, children, and parents. Counsel states that the applicant's husband earns \$40,000 annually and provides the sole income for his family. Counsel indicates that the applicant takes care of their infant daughter (born on December 28, 2007) and her 11-year-old daughter from a prior relationship. Counsel avers that the applicant's husband and children would experience extreme financial hardship if they remained in the United States without the applicant, and the applicant's husband had to support both his household in the United States and his wife's in Honduras. In addition, counsel states that the applicant's husband and children would endure the emotional hardship of separation from the applicant.

Further, counsel contends that the applicant's husband and children would experience extreme hardship if they relocated to Honduras. Counsel declares that the applicant's husband will either not find a comparable job to what he now has or will not find any employment at all. Counsel avers that except for his military service the applicant's husband has lived in Chicago since he was two years old. Counsel states that the applicant's husband does not have a college degree and is not fluent in Spanish. Counsel indicates that the applicant will not be able to resume her nursing career in Honduras since she lacks professional, social, and familial contacts and is unfamiliar with the job market. Additionally, counsel claims that the applicant's 11-year-old daughter does not speak Spanish, and will endure the hardship of living in an impoverished country with limited educational resources and opportunities.

Lastly, counsel declares that the applicant's parents have medical problems and will have emotional hardship if separated from their daughter. Counsel indicates that the applicant provides assistance to her father, who has Parkinson Disease and lives with the applicant and her family. In addition, counsel avers that the applicant and her family have a close relationship with the applicant's mother, who had a stroke a few years ago and lives nearby. Counsel asserts that the applicant's mother will be anxious about her daughter and grandchildren's safety if they relocated to Honduras, and will worry about her grandchildren if they remained in the United States without their mother. Counsel avers that the applicant's parents will lose their lawful permanent resident status if they relocated to Honduras.

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.

The record reflects that in Illinois on October 12, 2000, the applicant was charged with two counts of theft (unauthorized control of property) in violation of 720 ILCS 5/16-1-A1B1, a class A misdemeanor (case number 2000CM005347). On May 17, 2005, the applicant was found guilty of one of the counts for which she was ordered to pay a fine and costs of \$296, and was placed on supervision. The second count was nolle prossed on May 17, 2005.

On May 4, 2005, the applicant was charged with violation of 720 ILCS 5/16(a)(1), a class A misdemeanor (case number [REDACTED]). She was found guilty on May 4, 2005, and was ordered to pay a fine and costs of \$237, and was placed on supervision.

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 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 the recently decided *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.

At the time of the applicant’s convictions in 2000 and 2005, the statute under which she was convicted, 720 ILCS 5/16(a)(1), provided that “a person commits theft when he knowingly . . . [o]btains or exerts unauthorized control over property of the owner.” Violation of 720 ILCS 5/16(a)(1), is a Class A misdemeanor when the theft of property is not from the person and does not exceeding \$300 in value. *See* 720 ILCS 5/16(b)(1).

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.”).

We note that in *People v. Harden*, 42 Ill.2d 301, 303 (1969), the Supreme Court of Illinois states that theft is committed when a person knowingly obtains or exerts unauthorized control over property of the owner, and intends to deprive the owner permanently of the use or benefit of the property.

Accordingly, the AAO finds that conviction for theft under 720 ILCS 5/16(a)(1), which requires the intent to permanently take another person's property, involves moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. 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. The qualifying relatives in this case are the applicant's U.S. citizen husband and children, and lawful permanent resident parents. 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*, 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 will consider all of the evidence in the record, which consists of letters and other documentation.

With regard to remaining in the United States without his wife, the applicant's husband conveys in an undated letter that he loves his wife and will be devastated if separated from her. He indicates that he has a stepdaughter, [REDACTED], from his wife's prior relationship, and that his wife recently gave birth to their first child. [REDACTED] states in her letter dated April 13, 2008, that her mother is very important to her and that she will be very sad if she returns to Honduras. We further note that counsel conveys that the applicant's parents have a close relationship with the applicant and that her parents, and particularly her father who lives with the applicant and her family, will experience emotional hardship if separated from her. Besides emotional hardship, counsel conveys that the applicant's husband will endure financial hardship if his wife is unable to obtain a job in Honduras and he is required to support his children in the United States and his wife in Honduras on his annual income of \$40,000. Finally, counsel avers that the applicant's parents will experience emotional hardship if separated from the applicant.

The alleged hardships to the applicant's husband and children if they remain in the United States without the applicant are both emotional and financial in nature. The applicant's husband asserts, and the letters before the AAO demonstrate, that the applicant's husband and children have a close relationship with the applicant. We note that the record reflects that the applicant has been married to her husband since December 29, 2006. In view of the significant affect that the record establishes

that separation from the applicant will have on the applicant's husband and children, we find the applicant has demonstrated that separation will result in extreme hardship to her husband and children.

With regard to relocation to Honduras, the applicant's husband avers in an undated letter of living in the United States since he was two years old, and serving in the military for seven and one-half years. The applicant's husband states that both he and his stepdaughter are not fluent in Spanish. Furthermore, the applicant's wife conveys in a statement dated April 16, 2008 that she has lived in the United States since she was nine years old, that she is a graduate of Northeastern University, and that she has worked as a nurse. We note that the applicant's mother states in the letter dated April 10, 2008, that her daughter does not know anyone in Honduras. Moreover, on appeal, counsel declares that the applicant's husband will either not be able to find a comparable job to what he now has or will not find any job at all. Lastly, counsel avers that the applicant will not be able to work as a nurse in Honduras of lack of professional, social, and familial contacts and unfamiliarity with Honduras' job market.

Counsel claims that the applicant's oldest child, who was born on December 28, 1996, will experience the hardship of not knowing the Spanish language, not having the educational opportunities and resources equal to what she has in the United States, and having to adapt to life in an impoverished country. We note that counsel cites the U.S. Department of States report on Honduras to show the public educational system in Honduras has low enrollment at the secondary level, high drop-out rates, teacher absenteeism, and a low quality of classroom education. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2006: Honduras* (March 6, 2007). We observe that the report also conveys that even though education is free and compulsory through the age of 13, in 2002 the National Institute of Statistics (INE) reported that “only one of two students reached the sixth grade.”

Finally, counsel cites *In re Andazola-Rivas*, 23 I&N Dec. 319 (BIA 2002), and *In re Kao*, 23 I&N Dec. 45 (BIA 2001), to show that decreased educational opportunities is a hardship factor. We observe that in *Kao*, the applicant's U.S. citizen 15-year-old daughter had lived her entire life in the United States, and that the Board held that uprooting her to live in China “at this stage in her education and her social development” and requiring “her to survive in a Chinese-only environment would be a significant disruption that would constitute extreme hardship.” 23 I&N Dec. 45 at 50.

We further observe that Honduras was designated for Temporary Protected Status in 1999 based on environmental disaster conditions resulting from Hurricane Mitch, which occurred in 1998, and that the designation extends through January 5, 2012.

When the hardship factors to the applicant's 14-year-old daughter are considered collectively, the AAO finds they demonstrate that she will experience extreme hardship if she joins her mother to live in Honduras.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

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).

Id. at 301.

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 criminal convictions for theft.

The favorable factors are the extreme hardship to the applicant's daughter and the hardship to her other family members, and the statements by the applicant's family members and by [REDACTED] with [REDACTED] commending the applicant's character. In addition, ten years have passed since the applicant committed the offenses rendering her inadmissible. The AAO finds that the crimes committed by the applicant are serious in nature; nevertheless, when taken together, we find 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.

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 now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.