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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Administrative Appeals Office (AAO)
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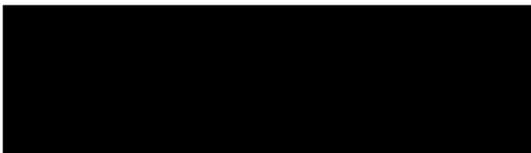
Office: SALT LAKE CITY, UT

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IN RE: 

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,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Chile who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing crimes involving moral turpitude. The applicant is the spouse of a U.S. citizen and has three U.S. citizen children. He seeks a waiver of inadmissibility in order to reside in the United States with his family.

In a decision, dated July 10, 2008, the field office director concluded that the applicant had failed to establish that his inadmissibility would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

In a brief on appeal, dated July 31, 2008, counsel states that the field office director erred in applying the exceptional and extremely unusual hardship standard to the applicant's case and that the extreme hardship standards in the applicant's case are the same as those applied in suspension cases. Counsel also states that during the applicant's adjustment interview the adjudicating officer inappropriately stated that the applicant was under investigation by the Federal Bureau of Investigation (FBI) for trafficking in cocaine. Counsel states that the applicant contacted the FBI and discovered that the allegation of an investigation was untrue. Finally, counsel states that the applicant has met his burden of proof in establishing his eligibility for a waiver.

Section 212(a)(2)(A)(i)(I) 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-

....

(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.

The record indicates that the applicant has a criminal record of seven arrests from 1998 to 2003, including three for driving on a revoked license, one for driving while under the influence, one for failure to obey a peace officer, one for issuing bad checks, and one for attempted theft.

A conviction for simple driving under the influence has been held not to be a crime involving moral turpitude. *In Re Lopez-Meza, Id.* 3423 (BIA Dec. 21, 1999). *See also, Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001). Similarly, the AAO finds that the applicant's convictions for driving on a revoked license and failure to obey a peace officer do not meet the standard for a crime involving moral turpitude.

The AAO now turns to the applicant's conviction for issuing bad checks. The record establishes that the applicant was arrested on August 23, 2002 in Spanish Fork, Utah. On December 12, 2002, in connection with this arrest, the applicant was convicted of issuing a bad check or draft, a third degree felony, under Utah Criminal Code (U.C.A.) § 76-6-505. The applicant was sentenced to an indeterminate prison term not to exceed five years. His prison term was then suspended except for serving 90 days in jail, he was made to pay \$9,384 in restitution, and he was placed on three years probation.

At the time of the applicant's conviction U.C.A. § 76-6-505 stated, in pertinent part:

- (1) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check or draft.

For purposes of this subsection, a person who issues a check or draft for which payment is refused by the drawee is presumed to know the check or draft would not be paid if he had no account with the drawee at the time of issue.

- (2) Any person who issues or passes a check or draft for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, payment of which check or draft is legally refused by the drawee, is guilty of issuing a bad check or draft if he fails to make good and actual payment to the payee in the amount of the refused check or draft within 14 days of his receiving actual notice of the check or draft's nonpayment.

Utah courts have found that the intent to defraud is not a necessary element for a conviction under U.C.A. § 76-6-505. *See State vs. Delmotte*, 665 P.2d 1314 (Utah 1983). However, no other statutory provisions in Utah law cover the crime of issuing bad checks with the intent to defraud, indicating that a crime involving intent to defraud would be prosecuted under this section of law. Furthermore,

the Board has found fraud to be inherent in committing the crime of issuing bad checks and any crime involving fraud has been found to be a crime involving moral turpitude. *Matter of Kahlek*, 17 I. & N. Dec. 518 (BIA 1980); *Matter of Ohnhausner*, 10 I. & N. Dec. 501 (BIA 1964); *Bull v. INS*, 790 F.2d 869 (11th Cir. 1986); *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965), *cert denied*, 383 U.S. 915 (1966). Thus, absent evidence to the contrary, the AAO finds that the applicant's conviction under U.C.A. § 76-6-505 is a crime involving moral turpitude.

The AAO now turns to the applicant's conviction under U.C.A. § 76-6-404 for attempted theft. The AAO notes that the record indicates that on March 6, 2002, the applicant was arrested and charged with two counts of attempted theft under U.C.A. § 76-6-404. On April 3, 2003, the applicant pled guilty to only one charge of attempted theft as a Class B misdemeanor under U.C.A. § 76-6-404, and the other charge being dismissed. The applicant was sentenced to serve 80 hours of community service, pay restitution in the amount of \$5,042, and was placed on probation for 18 months. The AAO notes that a Class B misdemeanor in Utah carries a maximum possible sentence of up to six months in prison.

At the time of the applicant's conviction U.C.A. § 76-6-404 stated, "A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." 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."). Although U.C.A. § 76-6-404 does not make a clear distinction as to whether conviction requires a permanent taking, the Utah courts, as well as other sections of the Utah Criminal Code, establish that an intent to permanently take another's property is an element of theft under U.C.A. § 76-6-404. In *State v. McKee*, 17 Utah 370, 53 P. 733 (1898), the court found that in prosecuting theft it was sufficient to prove beyond a reasonable doubt that the defendants had taken property away against the will of the owners, with the intention of permanently depriving the owners of their property. In addition, other sections of the Utah Criminal Code address offenses involving a temporary taking of another's property. U.C.A. § 41-1a-1314 addresses the offense of joyriding and U.C.A. § 76-6-404.5 addresses the offense of wrongful appropriations. At the time of the applicant's conviction, U.C.A. § 76-6-404.5 stated, in pertinent part,

A person commits wrongful appropriation if he obtains or exercises unauthorized control over the property of another, without the consent of the owner or legal custodian and with intent to temporarily appropriate, possess, or use the property or to temporarily deprive the owner or legal custodian of possession of the property....

Thus, the AAO finds that the applicant's conviction for attempted theft under U.C.A. § 76-6-404 required the intent to permanently take another person's property and is a conviction for a crime 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 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 spouse and three children are the 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 removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be

considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record of hardship includes: a letter from counsel, declarations of hardship from family members, a psychological assessment of the applicant’s spouse, tax and financial records, and evidence of the applicant’s rehabilitation and good moral character.

In her statement, dated August 27, 2006, the applicant’s spouse states that when the applicant was having legal troubles she suffered greatly and had to rely on government assistance. She states that now the applicant has completely changed and built a flourishing business that supports their family. She states that her family is very happy in the United States. She states that they have already paid the consequences of the applicant’s behavior and they do not want to pay for it again.

The psychological assessment, submitted by [REDACTED] and dated August 3 thru August 10, 2006, does not diagnosis the applicant with a mental health problem. The assessment states that the applicant’s spouse reports her mood on most days to be happy. The applicant’s spouse reported to [REDACTED] that throughout her life she has had a strained relationship with her mother and experimented with drugs and alcohol as a teenager. The applicant’s spouse also reports that she received psychological counseling as a teenager, that she was hospitalized for threatening suicide, and that she has a family history of bipolar disorder. However, the applicant’s spouse also states that her hospitalization was a result of her mother overreacting to a statement she made and lying to the authorities. She states further that she does not have symptoms of depression, suicidal ideations, suicide attempts, psychotic symptoms, symptoms of obsessive compulsive disorder, homicidal ideations, anxiety, or panic. [REDACTED] does report that under extreme stress people can revert to previously learned or experienced behaviors and that losing a spouse would be considered an example of extreme stress.

The AAO recognizes the concerns expressed in [REDACTED] assessment, but absent further details from the applicant's spouse concerning the specifics of the hardships she would suffer, the assessment does not reflect that the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility.

The AAO finds that the record of hardship fails to establish that the applicant's family would suffer extreme hardship as a result of the applicant's inadmissibility. The applicant has not submitted detailed documentation of the specific hardships his family would face if her were to be found inadmissible. The AAO does note that the record seems to place more evidence on establishing the applicant's rehabilitation and good moral character than on establishing extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse and/or children caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for 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.