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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  
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U.S. Citizenship  
and Immigration  
Services

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Date: NOV 02 2011 Office: CHARLOTTE FILE 

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.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to 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 crimes involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and mother.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated August 9, 2010.

On appeal, counsel for the applicant asserts that the applicant's wife and mother will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated October 12, 2010.

The record contains, but is not limited to: a brief from counsel; statements from the applicant, as well as the applicant's wife, parents, brother, mother-in-law, and other friends and relatives; copies of the applicant's and his wife's birth certificates; copies of medical records for the applicant's wife and mother-in-law; information on diabetes; copies of naturalization certificates for the applicant's mother and stepfather; tax records for the applicant's wife and mother; a copy of the applicant's marriage certificate; reports on conditions in Mexico; and documentation in connection with the applicant's criminal history. 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.)

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.

The record shows that the applicant pled *nolo contendere* to use of an access card without consent under California Penal Code § 484E(b) for his conduct on or about August 23, 1996. He pled guilty to fraudulent use of a credit card under California Penal Code § 484(g) for his conduct on or about May 2, 1997. He pled *nolo contendere* to a petty theft charge under California Penal Code § 484(a) for his conduct on or about December 13, 1999. He pled guilty to commercial burglary under California Penal Code § 459 for his conduct on or about February 2, 2002.

At the time of the applicant’s conviction for fraudulent use of a credit card, California Penal Code § 484G stated:

Use of card or account information unlawfully altered or obtained; false representation of card ownership

Every person, who with intent to defraud, (a) uses for the purpose of obtaining money, goods, services or anything else of value an access card or access card account information altered, obtained, or retained in violation of Section 484e or 484f or an access card which he or she knows is forged, expired, or revoked, or (b) obtains money, goods, services or anything else of value by representing without the consent of the cardholder that he or she is the holder of an access card or by representing that he or she is the holder of an access card and the card has not in fact been issued, is guilty of theft. If the value of all money, goods, services and other things of value obtained in violation of this section exceeds four hundred dollars (\$400) in any consecutive six-month period, then the same shall constitute grand theft.

All offenses under California Penal Code § 484G require an “intent to defraud.” Crimes that include as a requirement an intent to defraud have been held, as a general rule, to involve moral turpitude. *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992). There is ample support that all convictions under California Penal Code § 484G categorically constitute crimes involving moral turpitude. Accordingly, the applicant’s conviction under California Penal Code § 484G renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

At the time of the applicant’s conviction for petty theft, California Penal Code § 484(a) stated:

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.

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."). The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under California Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). In view of the holdings in *Castillo-Cruz* and *Matter of Grazley*, we find that the applicant's conviction for theft under California Penal Code § 484(a) constitutes a crime involving moral turpitude, and serves as another basis for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

As the applicant has been convicted of two crimes involving moral turpitude, he requires a waiver under section 212(h) of the Act. Accordingly, the AAO need not assess whether his convictions under California Penal Code §§ 459 and 484E(b) also constitute crimes involving moral turpitude.

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 wife and mother 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-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

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

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

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

In a statement dated October 2, 2010, the applicant expressed remorse for his criminal acts, and he indicated that he has reformed himself. In a statement dated September 10, 2010, the applicant explained that he and his wife were planning to have children before learning that his waiver application was denied, and the decision to wait until his immigration status is resolved is creating significant hardship for them. He indicated that they have a fear of him moving to Mexico. He noted that his wife has never left the United States and that her entire family resides here. He asserted that his wife's medical care is a vital part of their lives, and it would be drastically changed should they depart the United States. He stated that his wife has a close relationship with her mother who is unable to travel due to health and economic issues.

The applicant explained that he is close with his mother, and that his immigration difficulties place her in a constant state of anxiety. He asserted that she is under the care of a clinical psychologist, and that his departure would result in emotional hardship for her.

The applicant noted that his life would be in jeopardy in Mexico, as his uncle threatened to murder him there.

In an undated statement, the applicant's wife discussed her history with the applicant, including that they met in 2006, they began dating in January 2008, and they were married on August 18, 2009. She asserted that she would relocate to Mexico with the applicant, and that she will suffer extreme hardship there. She provided that she has been diagnosed with juvenile diabetes, and her condition is considered fragile due to frequent blood sugar fluctuations. She noted that she takes multiple medications and she is dependent on insulin. She provided that she has been hospitalized on numerous occasions including a week stay in an intensive care unit, and she averages approximately one major hospitalization every two years. She identified other health challenges she has faced, including a torn ligament in her knee and attention deficit hyperactivity disorder.

The applicant's wife explained that she is very close with her mother and grandmother, both who suffer from health problems. She indicated that she has a close relationship with other family members in the United States including her aunts, a cousin, and a niece and nephew. She explained that she intends to continue her education in the United States, yet she had to temporarily stop due to health and financial issues. She expressed concern regarding her ability to continue academic pursuits in Mexico.

The applicant's wife stated that she and the applicant would have difficulty finding employment in Mexico, and the loss of her health insurance frightens her. She added that she and the applicant have a townhouse in Charlotte, North Carolina, and that they own two other townhomes. She provided that they would likely incur a loss should they sell their properties in the present real estate market. She indicated that she does not speak Spanish, which would create challenges for her in Mexico. She expressed concern for violence in Mexico, including shootings, killings, kidnappings, and constant turmoil.

Applicant submitted letters from other family members and individuals who attest to his good character, participation in his community and humanitarian work, and close relationship with his wife and family.

In a brief dated October 12, 2010, counsel explains that the applicant's wife relies on the applicant to assist her when she has new illnesses. He notes that the applicant's wife's doctor advised her not to travel, which impacts her ability to relocate to Mexico. Counsel asserts that separating the applicant from his wife, by itself, would constitute extreme emotional hardship for the applicant's wife. Counsel asserts that the applicant and his wife will face significant financial difficulty should the applicant relocate to Mexico.

Upon review, the applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied. The record supports that the applicant's wife faces significant health problems, including serious symptoms related to diabetes that have required hospitalization. The applicant's wife's health challenges reach a level of severity not commonly faced by individuals who face the removal of a spouse. It is evident that the applicant's wife would face significant hardship should she relocate to Mexico and become separated from the doctors in the United States who provide her care. The record shows that she has health insurance through her employment, and ending her coverage would further complicate her access to continued medical care.

The applicant's wife would face other challenges should she relocate to Mexico, including the loss of her employment in the United States, separation from her country of birth and residence, separation from her family members with whom she shares a close relationship, loss of ability to reside in the home that she and the applicant own, an interruption of her ability to pursue her academic plans, and difficulties due to adapting to a new country and culture where she does not speak the national language. All elements of hardship are considered in aggregate, and due consideration is given to these factors.

The applicant's wife expressed that she will relocate with the applicant should he return to Mexico. This assertion, as well as numerous other statements in the record, support that the applicant and his wife share a close emotional bond, and that his wife will suffer significant psychological difficulties should she become separated from him. The medical documentation for the applicant's wife supports that she requires assistance when experiencing severe complications due to diabetes. It is clear that the applicant's presence, emotional support, and financial assistance are important for the applicant's wife's well-being, particularly in times of illness. Particularly given that the applicant's wife has been hospitalized multiple times, the record supports that she would face an unusual level of emotional difficulty should she reside apart from the applicant. While the record does not show that the applicant's wife would be unable to meet her financial needs in his absence, the AAO acknowledges her concerns for her economic well-being.

All elements of hardship to the applicant's wife have been considered in aggregate. Based on the foregoing, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to his wife, as required for a waiver under section 212(a)(9)(B)(v) of the Act. The AAO acknowledges that the applicant has presented explanation or evidence to support that his mother will face extreme hardship should he reside outside the United States. However, the applicant need only show that one qualifying relative will suffer extreme hardship, and no purpose is served in assessing whether his mother's challenges would rise to an extreme level as contemplated by section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the following:

The applicant has been convicted of four crimes, including crimes involving moral turpitude.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted of a crime since 2002, in approximately nine years; the applicant's U.S. citizen wife would experience extreme hardship if he is prohibited from residing in the United States; the applicant's U.S. citizen mother will face

significant hardship should he reside outside the United States; the applicant has shown a propensity to work and pay taxes, and to support his wife; the record supports that the applicant has provided meaningful emotional support to his wife during times of illness; and numerous individuals have attested to the applicant's good character and service to his community including raising AIDS awareness and working with a youth program.

The applicant's prior criminal acts involve theft and fraudulent behavior which calls into question his veracity and moral character. However, the applicant has expressed significant remorse for his prior transgressions, and the record does not show that he has a propensity to commit further criminal acts. Based on the foregoing, the benefits of keeping the applicant's family intact in the United States outweigh the gravity of his prior misconduct, such that a favorable exercise of discretion is warranted.

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 met that burden, and he has shown that he warrants a favorable exercise of discretion. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.