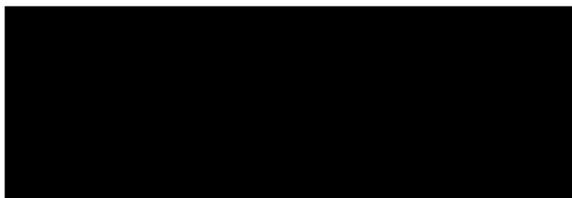


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

Date: **NOV 07 2011** Office: CIUDAD JUAREZ

FILE: 

IN RE:

Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h); and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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, Ciudad Juarez, Mexico, 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)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The field office director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, the applicant's wife contends that there is new evidence of extreme hardship and that the director did not weigh all the extreme hardship factors.

Upon review of the record, we find that the applicant has a theft conviction and that the field office director did not address whether this offense renders the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office or service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Thus, we will first address whether the applicant is inadmissible for having been convicted of a crime 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.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present.

However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

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

The applicant was convicted of petty theft in violation of Cal. Penal Code § 484 in 2004. He was sentenced to serve two years of probation and five days in jail.

At the time of the applicant's conviction, Cal. Penal Code § 484(a) provided, in pertinent part:

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. . . .

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."). The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. 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).

Nonetheless, the applicant's single conviction for a crime of moral turpitude, petty theft, falls within the petty offenses exception set forth under section 212(a)(2)(A)(ii)(II) of the Act. This provision states that the bar to admission of an alien convicted for a crime of moral turpitude does not apply to an alien who has committed only one such crime if:

[T]he maximum penalty possible for the crime of which the alien was convicted ... 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).

Cal. Penal Code § 490 states that "Petty theft is punishable by fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or both." The record indicates that the applicant was sentenced to two years of probation and five days in jail. The applicant's 2004 conviction for petty theft therefore falls within the petty offenses exception.

We will now address the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year.

Section 212(a)(9)(B) of the Act provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in May 2001, returning to Mexico in October 2001. In March 2003, the applicant again entered the United States without inspection and returned to Mexico in October 2007.

Based on the record, the applicant accrued unlawful presence from May 2001 until October 2001, and from March 2003 until October 2007. When the applicant left from the United States in October 2007, he triggered the ten-year bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act. That section provides that:

- (v) Waiver. – The Attorney General [now Secretary, Homeland Security, “Secretary”] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 or parent of the applicant. Hardship to the applicant or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant’s U.S. citizen spouse is the qualifying relative 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 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 evidence in the record consists of letters, financial documents, health alerts about Mexico from the Centers for Disease Control and Prevention (CDC) and from the World Bank, a declaration, birth certificates of the applicant’s wife and child, a marriage certificate, school records of the applicant’s wife, income tax returns for 2008, a disability payment issued to the applicant’s wife dated January 18, 2008, and other documentation.

The applicant’s wife states in the letter dated February 28, 2009 that she has been married to the applicant for over two and one-half years and lived with him for almost a year prior to their marriage. She indicates that her husband has never seen their child as she cannot afford to travel to Mexico. Further, she indicates that there are dangerous conditions in Mexico, as stated in the U.S. Department of State Travel Advisory. The applicant’s wife declares that she lost her job and received her last unemployment insurance payment and has no job prospects or medical care and is supported by her parents. She states that she cannot afford clothing and vitamins for her son and delayed his vaccinations because she does not want to borrow more money from her parents. The applicant’s wife indicates that her husband lives on his family’s ranch and his family members are poor, barely able to make ends meet. She asserts that her husband has no income and cannot send her any money and that she and her parents have sent her husband money. The applicant’s wife indicates that she has depression and is under the psychiatric care of [REDACTED]. She expresses concern about the long-term effect of separation from the applicant on their child. Lastly, the applicant’s wife conveys that she had been training for an assistant nursing credential and cannot afford the tuition and other expenses and has a student loan that she cannot pay without the help of her husband. The applicant’s wife states that when her hardships are considered together there is extreme hardship.

With regard to the aforementioned evidence, the applicant’s mother-in-law conveys in the declaration dated February 27, 2009 that she provides financial and emotional support to her daughter and grandchild. She indicates that her daughter has “so many problems she is seeking

professional help of a psychologist.” She states that her daughter has not found a job in which to support her one-year-old son. The applicant’s father-in-law states in the letter dated February 12, 2009 that his daughter “is going through depression, taking medications for her condition.” He states that “[i]t is hard because my daughter used to be a very happy person and now that she has depression she has isolated herself from everybody including her family even her son[.] She spends her days in her room crying everyday.”

The other letters in the record from family members and friends convey that the applicant’s wife has been emotionally withdrawn, and takes medication for depression and receives weekly therapy from a psychiatrist. [REDACTED] states in the letter dated March 2, 2009 that the applicant’s wife has been a psychotherapy client since February 10, 2009. The submitted invoices reflect the applicant’s wife has outstanding health care costs of almost \$3,000, student loans of \$5,092, and other loans of \$19,256. The federal income tax returns for 2008 reflect the applicant’s wife and child are dependents of his in-laws, and the applicant’s wife was a student.

The asserted hardships to the applicant’s wife in remaining in the United States without her husband are economic and emotional in nature. We find that the foregoing evidence in the record of the applicant’s wife’s depression and financial straits is consistent with the assertions of the applicant’s wife, in-laws, and friends, and that the effect of separation on the applicant’s wife is beyond that of the common result of inadmissibility. Thus, when we consider the hardship factors together, we find they demonstrate extreme hardship to the applicant’s wife.

With regard to joining her husband to live in Mexico, the applicant’s wife conveys in her declaration dated January 3, 2008 that she has never lived in Mexico and does not think it has a good lifestyle or is a secure place for her and her child. She also states that she would not have an opportunity to continue her education as she does not know Spanish grammar, and that her husband lacks skills in which to obtain a job. In addition, the applicant’s sister-in-law states in the letter dated February 1, 2009, that the applicant told her that the food and water makes him sick and his family is too poor to afford medicine. She further stated that she and her husband recently went to Mexico, and visited the applicant at his house and found “the conditions are really bad [I] felt really sad during my visit because [the applicant] does not deserve that. My family and [I] do not want my sister to visit him with the baby because of those harsh conditions . . .” Lastly, the poverty fact sheet from the World Bank describes half of the population in Mexico as living in poverty with one fifth living in extreme poverty in 2002.

The stated hardships to the applicant’s wife are financial and emotional. The record reflects that half of the population in Mexico lives in poverty and one fifth lives in extreme poverty. The record further reflects that the applicant has worked as a laborer in the United States, and that he has not been able to obtain a job for which he is qualified and that will pay a sufficient income in order to support his family in Mexico. The applicant’s sister-in-law describes the applicant as living in harsh conditions which would not be suitable for her sister and her young nephew. Thus, we find that when the hardship factors of the applicant’s wife’s mental health problems, of her having to leave the United States, where she has lived her entire life and has the support of family members and friends, and of having to live in abject poverty with her young son and husband are considered together, they demonstrate that the applicant’s wife would endure extreme hardship in joining her husband to live in Mexico.

In *Matter of Mendez-Moralez*, 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 conviction for theft in 2004 and the applicant's two entries without inspection and his unlawful presence in the United States.

The favorable factors are the extreme hardship to the applicant's wife and child, and the statements by the applicant's wife, in-laws, and friends commending his character. In addition, it has been seven years since the applicant's criminal conviction. The AAO finds that the crime and immigration violations 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 sections 212(h) and 212(a)(9)(B)(i)(II) 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.