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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Avenue, NW, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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DATE: NOV 22 2011

Office: LOS ANGELES

FILE: [REDACTED]

IN RE: [REDACTED]

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:

[REDACTED]

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 Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by the Field Office Director, Los Angeles, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Guatemala who entered the United States without admission on or around May 1, 1990. The applicant has not departed the United States since that time. The applicant has a U.S. citizen son, and she is the beneficiary of an approved Form I-130, Petition for Alien Relative. She filed a Form I-485, Application to Register Permanent Residence or Adjust Status on March 2, 2004. The applicant 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 a crime involving moral turpitude.¹ The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. §1182(h), in order to live in the United States near her family.

In a decision dated December 22, 2008, the director concluded the applicant had failed to establish that a qualifying relative would experience extreme hardship if she were denied admission into the United States. The waiver application was denied accordingly.

Through counsel, the applicant has appealed the denial of her Form I-601.² Counsel asserts that the director erred in not considering the cumulative hardship factors in the applicant's case and that the evidence, when considered in the aggregate, establishes the applicant's U.S. citizen son will experience extreme emotional and financial hardship if the applicant is denied admission into the United States. In support of his assertions counsel submits a letter written by the applicant's son, a psychological evaluation report for her son, and medical records for the applicant. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a) of the Act states in pertinent part:

(2) Criminal and related grounds.-

¹ The director's decision provides citations to the fraud or material misrepresentation inadmissibility provisions of section 212(a)(6)(C)(i) of the Act, and to waiver provisions of section 212(i). However, the director's decision discusses and analyzes only the applicant's inadmissibility for having committed crimes involving moral turpitude. The director's decision does not discuss fraud or material misrepresentations that the applicant may have made, and a review of the record contains no information to indicate the applicant committed fraud or made a material misrepresentation. It therefore appears the director erroneously referred to section 212(a)(6)(C)(i) and 212(i) of the Act provisions rather than to section 212(a)(2)(A)(i)(I) and section 212(h) of the Act.

² It is noted that the director's decision is dated December 22, 2008, and the date of filing contained on the Form I-290B, Notice of Appeal is February 11, 2009 (52 days later). Counsel submitted mailing envelope evidence establishing the Los Angeles Field Office did not mail the applicant's decision until January 8, 2009. Based on the evidence submitted, counsel established that the Form I-290B was timely filed on February 11, 2009.

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any 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.

Section 212(h) of the INA provides for the granting of a waiver of inadmissibility based on certain criminal grounds, and provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -

....

(1) (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 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

The applicant must also show that a waiver should be granted as a matter of discretion, with favorable factors outweighing the unfavorable factors in his or her case.

The Board of Immigration Appeals has stated:

[I]n 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).

Matter of Perez-Contreras, 20 I&N Dec. 615, 617-18 (BIA 1992). To determine if a crime involves moral turpitude, the U.S. Court of Appeals for the Ninth Circuit, in whose jurisdiction the instant case arises, first applies the categorical approach. *Ocequeda-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* at 999. 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.

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." *Matter of Silva-Trevino*, 24 I&N Dec. 687, 697 (A.G. 2008) (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. *Matter of Silva-Trevino*, 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (Citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

In the present matter, the record reflects that between 1997 and 1998, the applicant was convicted of the following offenses in California:

Municipal Court of Bakersfield, California - Forgery; Possession or Receipt of Items; Intent to Defraud, in violation of section 475(a) of the California Penal Code. The applicant was sentenced to 90 days in jail and 3 years probation.

Municipal Court of Orange County, California – Burglary, in violation of section 459 of the California Penal Code. The applicant was sentenced to 30 days in jail and 3 years probation.

Each of the above convictions is referred to in the director's denial decision, and counsel for the applicant admits to these convictions on appeal. A review of the record reflects, however, that the applicant was additionally convicted of the following offenses between 1997 and 1998.

Municipal Court of Orange County, California – Burglary: 2nd degree, Commercial/Vehicle, in violation of sections 459-460(b) of the California Penal Code and Making, Passing, Possessing Fictitious Check in violation of section 476 of the California Penal Code. The applicant was sentenced to 10 days in jail for these offenses.

Municipal Court of Los Angeles, California – Forgery, in violation of section 470 of the California Penal Code. The applicant was sentenced to 24 months probation.

Municipal Court of Orange County, California – Forgery, in violation of section 470 of the California Penal Code. The applicant was sentenced to 30 days in jail and probation for 3 years.

Section 459 of the California Penal Code provides in pertinent part:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, *with intent to commit grand or petit larceny or any felony is guilty of burglary.* (Emphasis added.)³

Burglary is considered to be a crime involving moral turpitude only when it is established that the offense was committed with the intent to commit a crime involving moral turpitude. *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). In the present matter, the language of section 459 of the California Penal Code includes burglaries in which the burglar intends to commit “any felony”, which could include a felony that does not involve moral turpitude. Because section 459 is divisible in this manner, Burglary under California Penal Code § 459 is not categorically a crime involving moral turpitude. A modified categorical approach is thus necessary to determine whether the respondent’s burglary conviction qualifies as a crime involving moral turpitude.

In the present case, the record contains only general court disposition information relating to both of the applicant’s convictions under section 459 of the California Penal Code. The record does not contain documentation describing the circumstances or facts of the offenses, and the conviction records do not clarify whether the applicant was convicted under a section of law involving moral turpitude. The evidence in the record is not sufficient to establish that the applicant was convicted

³ Section 460 of the California Penal Act states in pertinent part:

Degrees; construction of section

(a) Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.

(b) All other kinds of burglary are of the second degree.

Burglary in the second degree: by imprisonment in the county jail not exceeding one year or in the state prison. *See* section 461(b) of the California Penal Code.

for a burglary crime involving moral turpitude. The AAO finds, however, that for purposes of the present decision, it is not necessary to assess whether the applicant's convictions for burglary are crimes involving moral turpitude, as, in any event, the applicant is inadmissible for having committed a crime involving moral turpitude based on her forgery convictions, as discussed below.

Section 475(a) of the California Penal Code states:

Forgery; Possession or Receipt of Items; Intent to Defraud

(a) Every person who possesses or receives, with the intent to pass or facilitate the passage or utterance of any forged, altered, or counterfeit items, or completed items contained in subdivision (d) of Section 470 *with intent to defraud*, knowing the same to be forged, altered, or counterfeit, is guilty of forgery. (Emphasis added.)

Forgery has been held to be a crime involving moral turpitude. *See Matter of Seda*, 17 I&N Dec. 550 (BIA 1980). Furthermore, the Ninth Circuit Court of Appeals held in *Goldeshtein v. I.N.S.*, 8 F.3d 645 (9th Cir. 1993), that fraud crimes involve moral turpitude if intent to defraud is (1) an essential element of the crime or (2) if such intent is implicit in the nature of the crime. An intent to defraud applies to all of the elements contained in section 475(a) of the California Penal Code. Accordingly, a conviction under this section of law categorically applies to conduct involving moral turpitude. The applicant is therefore inadmissible under § 212(a)(2)(A)(i)(I) of the Act based on her section 475(a) of the California Penal Code forgery conviction.

Section 470 of the California Penal Codes states:

Forgery; Signatures or Seals; Corruption of Records

(a) Every person who, *with the intent to defraud*, knowing that he or she has no authority to do so, signs the name of another person or of a fictitious person to any of the items listed in subdivision (d) is guilty of forgery.

(b) Every person who, *with the intent to defraud*, counterfeits or forges the seal or handwriting of another is guilty of forgery.

(c) Every person who, *with the intent to defraud*, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court or the return of any officer to any process of any court, is guilty of forgery.

(d) Every person who, *with the intent to defraud*, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and

genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check, bond, bank bill, or note, cashier's check, traveler's check, money order, post note, draft, any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, receipt for money or goods, bill of exchange, promissory note, order, or any assignment of any bond, writing obligatory, or other contract for money or other property, contract, due bill for payment of money or property, receipt for money or property, passage ticket, lottery ticket or share purporting to be issued under the California State Lottery Act of 1984, trading stamp, power of attorney, certificate of ownership or other document evidencing ownership of a vehicle or undocumented vessel, or any certificate of any share, right, or interest in the stock of any corporation or association, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release or discharge of any debt, account, suit, action, demand, or any other thing, real or personal, or any transfer or assurance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal, or falsifies the acknowledgment of any notary public, or any notary public who issues an acknowledgment knowing it to be false; or any matter described in subdivision (b). (Emphasis added).

The record reflects that the applicant was convicted of Forgery of a Check, Money Order, Cashier's Check, Draft or Traveler's Check, pursuant to section 470(d) of the California Penal Code, a felony. As noted above, Forgery has been held to be a crime involving moral turpitude. *Matter of Seda*, 17 I&N Dec. 550. Moreover, because an intent to defraud applies to all of the conduct contained in section 470 of the California Penal Code, a conviction under this section of law is categorically a crime involving moral turpitude. The applicant's conviction under section 470 of the California Penal Code thus renders her inadmissible under § 212(a)(2)(A)(i)(I) of the Act.

Section 476 of the California Penal Code provides:

Forgery; Fictitious or Altered Bills, Notes, or Checks

Every person who makes, passes, utters, or publishes, *with intent to defraud* any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery. (Emphasis added).

A conviction under section 476 of the California Penal Code is categorically a conviction for a crime involving moral turpitude since forgery has been found to be a crime involving moral turpitude, and an intent to defraud applies to all of the conduct contained in section 476 of the Penal code. The applicant is thus inadmissible based on her conviction under this section of the California Penal Code.

The applicant must therefore establish that she qualifies for a waiver of inadmissibility by demonstrating that the denial of her admission into the United States would result in extreme hardship to a qualifying relative, and by demonstrating that a waiver should be granted as a matter of discretion, as set forth in section 212(h) of the Act.

The record reflects that the applicant has a U.S. citizen son, and two daughters and a son that are U.S. lawful permanent residents. The applicant's children are qualifying relatives for section 212(h) of the Act, waiver of inadmissibility purposes.

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 (BIA 1999), the BIA 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 BIA 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 BIA 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 BIA 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.

In the present matter, the record contains an affidavit written by the applicant’s U.S. citizen son stating that he and his brothers support the applicant emotionally and financially. He indicates that his mother has no one to care for her health and safety in her country, and that he would be unable to relocate with his mother due to his own family obligations in the U.S. He indicates that his family is very close and that they want their mother near them in the U.S. The record contains medical records for the applicant reflecting that she was admitted to the hospital on October 6, 2008 after suffering a stroke. She was prescribed medication for hypertension and hypercholesterolemia. She was also prescribed a walker. The record additionally contains a psychological evaluation report for the applicant’s son reflecting that he was referred for evaluation for Form I-601 waiver application purposes and that another brother and the applicant were also present during his two hour evaluation. Based on information obtained during the interview, the evaluator indicates the applicant’s son has distanced himself from his family, has lost weight, and is depressed by thoughts of his mother’s illness and her immigration situation. There is no indication that the evaluator independently verified the information provided to him by the applicant and her sons during the interview. The evaluation contains no diagnosis, and no treatment or follow-up therapy is prescribed. In addition to the above evidence, the record contains photos of the applicant’s family and income and federal tax return evidence for work done by the applicant in 2001 and 2002.

The AAO finds that the evidence in the record fails to show that the hardship faced by the applicant’s children, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship.

The psychological evaluation report indicates that the applicant's U.S. citizen son is experiencing symptoms of depression due to his mother's illness and her immigration situation. The report contains no actual diagnosis of the applicant's son's condition, however, and the report's conclusions are based solely on information gathered from the applicant and her two sons during a two hour interview. The evaluator does not prescribe treatment for the applicant's son, and the record contains no evidence that he has sought such treatment. We cannot conclude that the psychological evaluation report demonstrates that the applicant's son is experiencing emotional hardship beyond that normally experienced upon separation from a family member, or that he will suffer extreme emotional hardship in the future if the applicant is denied admission into the United States.

It is noted that the evidence in the record fails to demonstrate that the applicant would be unable to obtain medical care and treatment in Guatemala. Moreover, the record lacks any evidence to establish that the applicant's U.S. citizen son or other children are financially responsible for the applicant, that they have provided her with health care and insurance, and that they would experience extreme financial hardship if the applicant relocates to Guatemala.

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship" Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(h) of the Act, be above and beyond the normal, expected hardship involved in such cases.

Upon review of the totality of the evidence, the AAO finds that the applicant has failed to establish extreme hardship to a qualifying relative, as required under section 212(h) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for an 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 Form I-601 appeal will be dismissed.

ORDER: The appeal is dismissed.