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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
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



H₂

Date: OCT 05 2011

Office: MIAMI

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, Miami, Florida, and came before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed. The matter is again before the AAO on motion to reconsider. The motion will be granted and the appeal will be sustained.

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance. The record supports that he is also inadmissible under section 212(a)(2)(A)(i)(I) of 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 lawful permanent resident wife, father, son, and two U.S citizen children.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to show that a qualifying relative will experience extreme hardship if the waiver application is denied. *Decision of the Field Office Director*, dated September 27, 2010. The applicant appealed the matter, and the AAO determined that he failed to establish that he is statutorily eligible for a waiver under section 212(h). *Decision of the Administrative Appeals Office*, dated March 28, 2011.

On motion, counsel for the applicant asserts that the applicant has submitted sufficient documentation to show that his conviction for possession of cocaine was vacated due to procedural defects in the trial, so the conviction may not serve as a basis for inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. Counsel further contends that the applicant has shown that a qualifying relative will suffer extreme hardship should he depart the United States, and he warrants a favorable exercise of discretion. *Statement from Counsel on Form I-290B*, dated April 27, 2011.

The record contains, but is not limited to: briefs from counsel; documentation of the applicant's criminal history; copies of tax records for the applicant; copies of medical and psychiatric documents regarding the applicant's oldest son; documentation on conditions in Cuba; statements from the applicant's wife, son, niece, and others in support of the application; copies of the applicant's marriage certificate and birth records for his family members; and a copy of the applicant's father's naturalization certificate. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2) of the Act states in pertinent part:

Criminal and related grounds. —

(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, or

- (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), 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).

The record reflects that the applicant pled guilty to possession of cocaine under Florida Statutes § 893.13 for his conduct on February 1, 1996 and he was sentenced to one year of probation. Counsel asserted that the conviction was vacated pursuant to a procedural defect, and thus it may not serve as a basis for inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. On appeal, the AAO found that the applicant had not established the basis on which his controlled substance conviction was vacated. The AAO cited *Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006), and *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), for the proposition that a conviction must be vacated based on a procedural or substantive defect in the criminal proceedings, not a State rehabilitation statute, in order to render it not a conviction under section 101(a)(48)(A) of the Act. Because of this conviction for a crime involving a controlled substance, the AAO determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act, with no waiver available.

On motion, the applicant submits a copy of an "Amended Motion to Vacate Plea and Sentence" that asserted that the applicant's plea to possession of cocaine was involuntary pursuant to Fla. R. Crim. P. § 3.172(c)(8) due to the facts that the applicant's attorney in criminal proceedings erroneously informed him he could have the conviction expunged if he accepted the plea, and the trial judge failed to advise the applicant of possible immigration consequences of his plea. The Circuit Court Judge in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida vacated the applicant's plea and sentence, noting that the court's order was based "on the Grounds stated in

[the applicant's] Motion to Vacate Plea and Sentence." Accordingly, the judge accepted the applicant's assertions regarding his conviction for possession of cocaine, and the applicant has shown that his conviction was vacated due to procedural irregularities in his trial. Thus, it does not render him inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

However, the applicant was convicted of other offenses that render him inadmissible. The record shows that the applicant was convicted of burglary of an unoccupied structure under Fl. Stat. § 810.02(4)(a) and grand theft third degree under Fl. Stat. § 812.014(2)(c) for his conduct on or about January 15, 2002.

At the time of the applicant's convictions, Fl. Stat. § 812.014 stated:

(1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriately the property to his or her own use or to the use of any person not entitled to the use of the property.

...

(2) (c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

1. Valued at \$300 or more, but less than \$5,000. . . .

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.

In the instant case, the statute under which the applicant was convicted, Fl. Stat. § 812.014, involves both temporary and permanent takings. A plain reading of Fl. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. 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.”). Therefore, the AAO cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, we will apply the modified categorical approach and engage in a second-stage inquiry by reviewing the record of conviction to determine if the conviction was based on conduct involving moral turpitude. *Silva-Trevino* 24 I&N Dec. 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. The record of conviction in this case includes the “Information” filed by the state prosecuting attorney, which provides that the applicant was charged with the following:

[The applicant] did unlawfully and knowingly obtain or use, or did endeavor to obtain or use US coins or currency value of three hundred dollars (\$300.00) or more, but less than five thousand dollars (\$5000.00), the property of [another individual], as owner or custodian, with the intent to either temporarily or permanently deprive said owner or custodian of a right to the said property or a benefit there from, or to appropriate the same to said defendant’s own use or to the use of a person not entitled thereto

As the Information states that the applicant had the intent to either temporarily or permanently deprive the owner of the funds in question, the formal record of conviction does not settle whether the applicant intended to commit a permanent taking.

The record contains a Complaint/Arrest Affidavit, dated January 12, 2002, that describes the conduct that led to the applicant's arrest and charges. The document explains that, at approximately 11:00 PM on January 12, 2002, the applicant used a large rock to break the rear office window of a business, and he then climbed through the window to gain entry. Once inside, he removed a bank bag containing \$1,862. The applicant "located and voluntarily responded to MSPD [Miami Springs Police Department]" where he admitted to committing burglary and theft and was arrested. Complaint/Arrest Affidavit was completed on January 15, 2002, and it reports that the applicant was arrested at 10:30 AM that day. Accordingly, the applicant voluntarily relinquished the funds that he took from the business approximately three days later.

The facts that the applicant returned the funds and presented himself to police for prosecution do not, by themselves, definitively settle the matter of whether he intended to permanently deprive the owner of the funds at the time that he committed burglary and theft. While the applicant's voluntary submission to police is a clear expression of remorse, it does not change the underlying offenses that he committed or the intent he held at the point of commission.

The applicant has not provided a statement in which he addresses the circumstances of his burglary and theft. While counsel's statements are not evidence in the present matter¹, it is noted that counsel discusses in her brief the facts surrounding the applicant's burglary and theft. Specifically, counsel states that the applicant burglarized a building owned by his friend who owed him money but who refused to pay. Counsel indicated that the applicant was intoxicated and angry, and intended to attempt to recover his money. Counsel added that the applicant acknowledges that he committed an illegal action, and he expresses remorse.

Given that the applicant intended to recover funds he believed were owed to him, these facts suggest that he did not intend to return the funds at the time he committed burglary and theft. The applicant has not shown by a preponderance of the evidence that he intended to take the funds for a temporary period, as such intention is contrary to an effort to collect a debt, despite the fact that he ultimately surrendered himself to police. The applicant bears the burden of proof in these proceedings. Section 291 of the Act, 8 U.S.C. § 1361. Based on the foregoing, the applicant has not established that his act of theft did not constitute a permanent taking that renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

At the time of the applicant's convictions, Fl. Stat. § 810.02 stated:

¹ Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

(1)(b) For offenses committed after July 1, 2001, “burglary” means:

1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; . . .

(4) Burglary is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:

(a) Structure, and there is not another person in the structure at the time the offender enters or remains; or

(b) Conveyance, and there is not another person in the conveyance at the time the offender enters or remains.

The Board of Immigration Appeals (BIA) has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); *see, e.g., Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005) (“Because the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny therein is likewise a crime involving moral turpitude.”).

Fl. Stat. § 810.02 does not specify particular offenses that a defendant intended to commit while engaging in burglary. Based on the plain language of this section, an individual could be convicted under Fl. Stat. § 810.02 for committing burglary with an intent to commit a crime that involves moral turpitude or one that does not. Accordingly, the AAO looks to the record of conviction to determine the particular offense that the applicant intended to commit.

The record of conviction in this case includes the “Information” filed by the state prosecuting attorney, which provides that the applicant was charged with the following:

[The applicant] . . . did unlawfully enter or remain in a structure, to wit: a building or the curtilage thereof, . . . without the consent of . . . [the] owner or custodian, [the applicant] having an intent to commit an offense therein, to wit: theft

The applicant did in fact commit an act of theft for which he was convicted under Fl. Stat. § 812.014. As discussed above, the applicant has not shown that his act of theft was not a crime involving moral turpitude. Accordingly, he has not shown that his act of burglary was not a crime involving moral turpitude. Therefore, this conviction under Fl. Stat. § 810.02 also serves as a basis of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

Based on the foregoing, the applicant requires a waiver under section 212(h) of the Act.

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, children, and father 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 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).

On appeal, the applicant presents evidence to show that his lawful permanent resident son suffers from schizophrenia. A July 16, 2010 medical form from a psychiatrist indicates that the applicant's son was presented for treatment and declared "[i]ncompetent to provide express and informed consent to voluntary admission and thus . . . incompetent to provide express informed consent to treatment." The form further indicated that the applicant's son "must be transferred to involuntary

status and a petition for Guardian Advocate filed with the Circuit Court.” The applicant’s son has been admitted for treatment on multiple occasions, and he takes prescription medication for psychosis. The documentation provided shows that he has engaged in violent behavior and suffered significant delusions, poor awareness of his present problem, and poor judgment for his age. It is evident that he requires continued care.

In a statement dated November 26, 2010, the applicant’s wife explained that the applicant is their primary source of support for their household, and they need him both morally and economically. She referenced their son’s mental health challenges, and noted that he is taking medications and he will spend time at a hospital. She indicated that the applicant has been supporting their family during their times of trouble, and they share a close relationship. In a statement dated March 3, 2010, the applicant’s wife noted that she and the applicant have been married for more than 19 years, and that he has shown exemplary parental behavior towards their children, and embraced responsibility, reliability, and honesty towards his family and others.

The applicant’s oldest son expressed that the applicant has worked hard to support their family for the previous 18 years, and that the applicant welcomed him as a stepson and raised him. He explained that he is homosexual, and the applicant has defended him, including cutting family ties with those who didn’t accept him and visiting his middle school and high school many times. He added that the applicant has supported him in his dreams and career goals, and has funded his attendance of colleges and trade schools. He expressed that they would not be a family anymore without the applicant.

The applicant has provided letters from other individuals in support of his application who attested to his strong work ethic, honesty, kindness, and support of his wife, children, and other family members.

Counsel asserts that the applicant’s wife and children would suffer extreme hardship should they reside in the United States without him. Counsel further asserts that the applicant’s wife and children would face extreme hardship should they relocate to Cuba. Counsel contends that the applicant’s son with mental health issues would experience significant difficulty due to the inhumane and cruel treatment Cuba gives to mentally ill citizens. Counsel states that the applicant’s family may be targeted by the Cuban government due to their foreign nationality. Counsel indicates that the applicant’s family members will be impacted by the economic and political unrest in Cuba.

Upon review, the applicant has shown that his oldest son, Alexander, will suffer extreme hardship should the present waiver application be denied. Alexander’s serious mental health challenges are well-documented, and create circumstances not commonly experienced by individuals who face the removal of a parent. The record establishes that he requires significant assistance and support from his family members. The applicant contributes to Alexander’s emotional and economic support directly. The applicant further supports his wife, which creates financial and emotional stability for the family and, in turn, allows the applicant’s wife to care for Alexander. Should the applicant depart the United States and Alexander remain, Alexander will face significant disruption in his care and well-being, the loss of the direct emotional support of his father during a time of serious mental illness, and the loss of economic support.

Alexander has received medical and psychiatric care in the United States including involuntary commitment, and he has been prescribed multiple medications for psychosis. It is evident that relocating to Cuba would disrupt his relationship with the professionals in the United States who are familiar with his history and needs. Should his family relocate to Cuba, the resulting financial challenges could further jeopardize his access to needed mental health services. The AAO acknowledges the applicant's family's concern for the poor quality of mental health care available in Cuba. Alexander would face other elements of hardship in Cuba including separation from his country of residence and exposure to challenging political and economic conditions.

Considering the totality of Alexander's circumstances, the AAO finds that he will suffer extreme hardship should the applicant reside outside the United States. Thus, the applicant has shown that denial of the present waiver application "would result in extreme hardship" to a qualifying relative, as required for a waiver under section 212(h) 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 multiple criminal offenses, including crimes involving moral turpitude and two instances relating to public intoxication.

The positive factors in this case include:

The record shows that the applicant has exhibited remorse for his prior criminal acts, and attempted to use his mistakes as a tool to teach others. For example, in a statement dated March 3, 2010, the applicant's niece provided that:

[The applicant] is a very important part of my life. He is always there guiding me in the right direction. He is always giving me advice. He is very patient with me. He often tells me about mistakes that he has made and how he has learned from them in hopes that I will learn too.

As discussed above, the applicant's lawful permanent resident son, Alexander, suffers from serious mental health challenges, and the applicant has contributed significantly to his support and care. In an undated statement, Alexander provided:

[The applicant] has done nothing but work to support my family for the past 18 years, [and] he even welcomed me with open arms as a step-son. . . . I honestly could not ask for a better man to have raised me. I am a homosexual and I came out to my

parents at 13 years of age[.] [1]hat is not an easy thing for any father to accept, but he did. He never gave me any grief about my homosexuality and allowed me to live my life as a normal part of the family, and he cut any of his family ties when they had a problem with me. He has gone to my middle school and highschool [sic] many a-time to defend me. He also supports and believes in all my dreams and career goals, [and] he has actually been the one to spend the money on all the colleges and tradeschools [sic] I have dropped from, but even so he still supports me and my decisions.

The AAO finds the applicant's support for Alexander to be a testament to the applicant's good character. Numerous other individuals have contributed letters lauding the applicant's good character and support for his family.

The applicant's wife and children will endure significant hardship should the applicant be compelled to reside outside the United States. The applicant has resided in the United States since 1989, and it is evident that he, too, will face substantial challenges should he now return to Cuba.

The applicant's criminal actions cannot be condoned. However, the fact that the applicant voluntarily presented himself to police for prosecution for burglary and theft, days after he committed the offenses, shows remorse. His offenses relating to public intoxication raise questions regarding his responsible use of alcohol, yet these offenses occurred in 1992 and 1999, approximately 11 or more years ago. The record does not reflect that the applicant has a propensity to engage in further criminal acts. Considering all factors collectively, the positive factors in this case outweigh the negative factors, such that the applicant warrants a favorable exercise of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.