



U.S. Citizenship
and Immigration
Services

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DATE: **DEC 20 2012** Office: CHICAGO, ILLINOIS

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h), of the Immigration and Nationality Act.

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Poland who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant is the spouse and mother of U.S. citizens and the daughter of a lawful permanent resident. She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would result in extreme hardship for a qualifying relative. She denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated December 5, 2011.

On appeal, counsel states that the Field Office Director's decision is not supported by the facts in the record or applicable precedent. *Form I-290B, Notice of Appeal or Motion*, dated January 3, 2012.

The record of evidence includes, but is not limited to: counsel's briefs; statements from the applicant, her spouse, her sons, her mother, one of her sisters, her mother- and father-in-law and friends; documentation of the applicant's and her spouse's financial obligations; tax returns and W-2 Wage and Tax Statements for the applicant and her spouse; an employment letter and earning statements for the applicant's spouse; bank statements; school records and certificates for the applicant's sons; proof of health insurance coverage; country conditions information on Poland; and court records relating to the applicant's convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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

- (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.)

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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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 or “modified categorical” inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment or conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708. Finally, 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.

The record reflects that, on March 11, 1996, the applicant pled guilty to misdemeanor Theft, 720 Illinois Compiled Statutes (ILCS) 5/16-1(a)(1)(A), in the Circuit Court of Cook County, Illinois. She was placed on supervision for one year and ordered to pay restitution in the amount of \$150. On April 24, 2000, the applicant again pled guilty to misdemeanor Theft, 720 ILCS 5/16-1(a)(1)(A) in the Circuit Court of Cook County. She participated in the Sheriff’s Work Alternative Program from May 20, 2000 until August 14, 2000 and was placed on probation for two years.

At the time of the applicant’s 1996 and 2000 convictions for theft, 720 ILCS 5/16-1(a)(1)(A) stated:

5/16-1. Theft

§ 16-1. Theft. (a) A person commits theft when he knowingly:

(1) Obtains or exerts unauthorized control over property of the owner . . . and

(A) Intends to deprive the owner permanently of the use or benefit of the property. . . .

Violation of 720 ILCS 5/16-1(a)(1)(A), is a Class A misdemeanor when the theft of property is not from the person and does not exceed \$300 in value. *See* 720 ILCS 5/16-1(b)(1).

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."). We also note that in *People v. Harden*, 42 Ill.2d 301, 303 (1969), the Supreme Court of Illinois stated that theft is committed when a person knowingly obtains or exerts unauthorized control over property of the owner, and intends to deprive the owner permanently of the use or benefit of the property. Accordingly, the AAO finds that Theft, 720 ILCS 5/16-1(a)(1)(A), which requires the intent to permanently take another person's property, involves moral turpitude and bars the applicant's admission to the United States under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest this finding.

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

. . .

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

A waiver under section 212(h) of the Act is dependent first upon a showing that the bar to admission would impose extreme hardship on a qualifying relative, the U.S. citizen or lawfully resident spouse, parent or child of an applicant. The qualifying relatives in this proceeding are the applicant's U.S. citizen spouse, children and her lawful permanent resident mother.¹ Accordingly, hardship to the applicant or other family members will be considered only insofar as it results in hardship to one of these relatives. 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 BIA 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

¹ The AAO notes that the record also indicates that the applicant's father is a U.S. citizen and, therefore, a qualifying relative for the purposes of this proceeding. The applicant does not, however, include her father among her qualifying relatives and does not indicate that he would experience hardship if the waiver application is denied. Therefore, he has not been considered in the determination of extreme hardship.

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.

On appeal, counsel asserts that the denial of applicant's waiver application will result in extreme hardship for her U.S. citizen sons, 15-year-old [REDACTED] and 11-year-old [REDACTED]. Counsel states that neither of the applicant's children have a close relationship with their fathers and that the applicant was the only constant in their lives until their stepfather entered their lives in 2007. She notes that the applicant has sole custody of [REDACTED] and that although her marital settlement with [REDACTED] father allows him "liberal periods of visitation," with his son, he has never availed himself of this opportunity, seeing [REDACTED] only about twice a year. As a result, counsel asserts, [REDACTED] does

not have a strong relationship with his father and would be traumatized if he were uprooted from his home and placed in his biological father's custody. The applicant's younger son, [REDACTED] counsel states, has no contact or relationship with his biological father who was never married to his mother.

In a July 12, 2011 affidavit, the applicant contends that if she is removed to Poland, her children would be separated from each other. She states that [REDACTED] would have to live with his father and [REDACTED] with her family, since her spouse's long work hours would prevent him from caring for [REDACTED] on a daily basis. She asserts that as a result of her removal, her sons' lives would be completely uprooted as they would lose their mother, their stepfather and each other. The applicant states that she does not know what her sons would do without each other.

These same concerns are reflected in July 12, 2011 affidavits from the applicant's sons. [REDACTED] states that his mother is the person who has always taken care of him and that if she is returned to Poland, he would have to live with his father whom he sees only once or twice a year. He states that living with his father would mean he would be separated from his little brother and that he does not know what he would do without his mother and his brother. The applicant's younger son, [REDACTED] asserts that if his mother is removed, he does not know what would happen to him, where he would live or who would take care of him. He states that his brother Joshua is his closest friend and that he would miss him a great deal if they were separated.

The record includes a copy of an August 28, 2005 marital settlement agreement between the applicant and her first husband that awards her custody and primary care of their son [REDACTED]. The document further indicates that [REDACTED] father will have "reasonable and liberal periods of visitation with [REDACTED] including alternating weekends" and that he is required to pay \$88 a week in child support. While the marital settlement does not address the issue of custody in the event of the applicant's death or inability to care for [REDACTED], the AAO finds it reasonable to conclude that in such circumstances, Joshua's custody would revert to his father.

Based on the record before us, the AAO concludes that the denial of the applicant's waiver application would result in extreme hardship for her older son if he remains in the United States. We find that the applicant's removal would not only separate Joshua from the mother who has been the constant parental presence in his life, but would likely place him in the custody of his father, thereby removing him from his current home and separating him from his 11-year-old brother and the stepfather who has been part of his life since 2007. These multiple losses, when considered in the aggregate and with respect to a 15-year-old child, support a finding of extreme hardship.

Counsel also claims that the applicant's children cannot move to Poland with the applicant because their family, their schooling, and everything and everyone they know is in the United States. She states that the applicant's children have never been to Poland and do not speak, read or write Polish well enough to attend school in Poland. In her July 12, 2011 affidavit, the applicant states that her sons speak a little Polish, but not enough to get by in Poland and would not be able to attend school.

The AAO notes that in *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001), the BIA found that a 15-year-old child who was not fluent in Chinese, had spent her formative years in the United States and was integrated into the American lifestyle would experience extreme hardship if she relocated to Taiwan with her parents. In the present case, the applicant's 15-year-old

son, like the child in *Kao and Lin*, is not fluent in the language of the country to which he would relocate, has spent his formative years in the United States and is integrated into the American lifestyle. Therefore, pursuant to the reasoning in *Kao and Lin*, the AAO finds the applicant to have established that relocation to Poland would result in extreme hardship for her 15-year-old son.

As the applicant has established that a qualifying relative would experience extreme hardship as a result of her inadmissibility, she has met the statutory requirements for a section 212(h) waiver and the AAO will now consider whether she also merits a favorable exercise of discretion.

In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . 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).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance 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 applicant's case are the thefts she committed in 1996 and 2000, and her periods of unlawful employment. The mitigating factors include the applicant's U.S. citizen spouse and children, her lawful permanent resident mother and U.S. citizen father, as well as her sisters; the extreme hardship her older son would experience if the waiver application is denied, as well as the general hardship her removal would create for the other members of her family; the absence of any arrests or convictions since 2000; her statements of remorse for the actions that led to her convictions; her payment of taxes; and the statements of support submitted by her family members and friends attesting to her devotion and support of her family, and her generosity to others.

The AAO acknowledges the serious nature of the applicant's theft convictions and does not condone them. Nevertheless, we find that, when taken together, the mitigating 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 section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has met that burden.

ORDER: The appeal is sustained.