U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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U.S. Citizenship and Immigration Services

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Date: FEB 17 2012 Office: MIAMI, FL 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:

[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.

Thank you,

Michael Humway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Miami, Florida and is now before the Administrative Appeals Office (AAO) on appeal. 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)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. The applicant 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 with his U.S. citizen spouse, father, daughter, and step-son.

In a decision, dated June 24, 2009, the field office director found that the applicant failed to establish that his qualifying relatives would suffer extreme hardship as a result of his inadmissibility. Specifically, the field office director stated that the applicant failed to provide evidence as to why his qualifying relatives could not live outside the United States, why his stepson could not find medical treatment in another country, or why his wife and child could not visit the applicant somewhere other than Cuba. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated July 21, 2009, counsel states that the field office director erred in finding that the applicant's spouse will not suffer extreme hardship. She states that the record clearly shows that the applicant's spouse will suffer not just financial hardship, but also hardship in her inability to care for their three year old daughter, her diabetic son, and her elderly father-in-law. Counsel also states that the applicant's elderly father will also suffer extreme hardship as he is retired, has a medical condition, and relies on the applicant. Finally, counsel states that the applicant's qualifying relatives would suffer extreme hardship if they had to travel to Cuba to seek medical treatment and they would risk being detained.

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

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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 indicates that on May 13, 2005, in Miami-Dade County, Florida, the applicant was arrested and charged with one count of operating a chop shop under Florida Statutes § 812.16 and two counts of Grand Theft under Florida Statutes § 812.014. All three offenses were classified as third degree felonies and a third degree felony is punishable in Florida by up to 5 years in prison.

The applicant's case arises under the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently adopted the traditional categorical approach for determining whether a crime involves moral turpitude. *See Fajardo v. Attorney General,* 659 F.3d 1301, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). In its decision, the Eleventh Circuit defined the categorical approach as " 'looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.' " 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernauth v. U.S. Att'y Gen.,* 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The AAO now turns to a consideration of whether the applicant's convictions constitute crimes involving moral turpitude and will employ the traditional categorical approach mandated by the Eleventh Circuit, restricting any modified categorical inquiry to the applicant's record of conviction.

At the time of the applicant's conviction, Fl. Stat. § 812.014 provided, in pertinent parts:

> (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) Appropriate 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 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. *Fajardo, supra,* 659 F.3d at 1305. 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.*

The AAO notes that the applicant's other conviction, for an offense that was part of the scheme of criminal conduct related to his conviction on two counts of grand theft, was for aiding and abetting another person in owning and operating a "chop-shop" under Fl. Stat. § 812.16.

At the time of the applicant's conviction, Fl. Stat. § 812.16 provided, in pertinent parts:

> (1) As used in this section, the term:
>
> > (a) "Chop shop" means any area, building, storage lot, field, or other premises or place where one or more persons are engaged or have engaged in altering, dismantling, reassembling, or in any way concealing or disguising the identity of a stolen motor vehicle or of any major component part of a stolen motor vehicle; where there are two or more stolen motor vehicles present; or where there are major component parts from two or more stolen motor vehicles present.
> >
> > ...
> >
> > (2) Any person who knowingly owns, operates, or conducts a chop shop or who knowingly aids and abets another person in owning, operating, or conducting a chop shop is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Thus, the record of conviction indicates that the applicant was involved in stealing motor vehicles, dismantling them to conceal their identity, and then selling the dismantled parts. The complaint in the applicant's case, dated May 13, 2005, states that various dismantled car parts were found in the chop shop. The AAO finds that because the stolen items that were found at the crime scene were dismantled motor vehicle parts his taking of these parts can reasonably be determined to be permanent. Therefore,

the AAO finds that the applicant has been convicted of at least two crimes involving moral turpitude when he was convicted of two counts of grand theft under Fl. Stat. § 812.014.

The AAO notes that the applicant does not dispute the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act and unlike a removal hearing in which the government bears the burden of establishing a respondent's removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility for admission to the United States "to the satisfaction of the Attorney General [Secretary of Homeland Security]." *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not shown that his is admissible.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . 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 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, father, and daughter are the qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

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

The Board has also held that the common or typical results of 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 record of hardship includes: counsel's brief, an affidavit from the applicant's spouse, an affidavit from the applicant's father, medical records for the applicant's stepson, a psychological evaluation for the applicant's father, documentation regarding the applicant's father's inability to support himself, country condition information for Cuba.

In her brief, counsel states that the applicant's qualifying relatives: his spouse, elderly father (who suffers from depression), and three-year-old daughter, are all U.S. citizens and all live together. She states that the applicant's spouse also have a sixteen-year-old son who suffers from juvenile diabetes, hyperthyroidism, and has had a recent hospitalization for epileptic seizures. Counsel states further that the applicant is the only relative his elderly father has in the United States and that due to his depression and medications he cannot live alone and depends on the applicant for his meals, food, shopping, laundry, and emotional well-being. Counsel also asserts that contrary to the field office director's statements, the applicant's qualifying relatives cannot live anywhere in the world they desire. The applicant's U.S. citizen spouse, father, and stepson were all born in Cuba and the

applicant is only a citizen of Cuba, so their options for relocation are limited to Cuba. In her brief, counsel cites to country reports issued by the U.S. State Department concerning conditions in Cuba. She states that the applicant's U.S. citizen relatives would face hardship if they had to travel to Cuba as Cuba is classified as a totalitarian state which denies its citizens basic human rights. Counsel also states that the applicant's stepson and father would not be able to receive adequate medical care in Cuba, as the U.S. government has determined that Cuban medical facilities do not meet U.S. standards. She states further that upon relocation the applicant's U.S. citizen relatives would risk not being able to return to the United States and would risk losing their U.S. citizenship in Cuba as the Cuban government does not recognize dual citizenship.

In her affidavit, dated July 10, 2009, the applicant's spouse states that she lives with the applicant, their daughter, her sixteen-year-old son, and her elderly father-in-law. She states that her sixteen year old son suffers from juvenile diabetes and hyperthyroidism. She states that her son must self-inject insulin twice daily and takes medication for both his diabetes and his thyroid. She states that he recently began having epileptic seizures and must take medication for these seizures four times per day. The applicant's spouse states that the applicant's father has been diagnosed with Major Depressive Disorder Recurrent with Psychotic features, that he is very depressed, and has problems eating and sleeping. She states that the applicant's father also takes medication and cannot live alone. The applicant's spouse states that she would suffer extreme hardship upon relocating to Cuba with her two children. She states that her son would not have access to comparable medical treatment in Cuba and that they do not have the funds for the family to travel to Cuba or any other country. She states that if she is separated from the applicant she will become a single mother and will not be able to work full time, while caring for her three-year-old daughter, son, and elderly father-in-law.

In his affidavit, dated July 10, 2009, the applicant's father states that he is 72 years old and that he can no longer live alone due to his medical condition. He states that when he applied for citizenship he was granted a disability exception and that he has been in treatment for his depression since at least October 2006. He states further that he receives social security benefits of $674 per month and food stamps in the amount of $162 per month. He also states that the applicant is his only relative in the United States and that the applicant takes care of his everyday needs and emotional well-being. Finally, the applicant's father also expresses concern over the medical care he would receive if he moved to Cuba and that financially he would not be able to move.

The AAO notes that the record includes documentation establishing that the applicant's stepson suffers from diabetes, hypertrophy, and seizure disorder. The medical documentation submitted shows that the applicant's stepson is on medication for his conditions and was hospitalized for three days in 2009 due to having seizures. Documentation in the record also shows that the applicant's father suffers from recurrent depression, takes several medications, and receives social security and food stamp benefits. In addition, the U.S. State Department country reports for Cuba support the assertions made regarding medical care in Cuba, dual nationality in Cuba, and the risk of the applicant's qualifying relatives being restricted from traveling back to the United States if they are forced to sign repatriation declarations by the Cuban government.

Thus, the AAO finds that the applicant's spouse and father would suffer extreme hardship as a result of the applicant's inadmissibility. If the applicant and his spouse relocate to Cuba with their children and the applicant's elderly father they will risk disrupting not only the applicant's father's medical

treatment for his major depression, but also the applicant's stepson's medical treatment for diabetes, hypertrophy, and seizure disorder. The consequences of this disruption and the inability for either the applicant's father or son to find comparable treatment in Cuba would likely be a significant hardship for both of them. It is also reasonable to infer that any harm to the applicant's stepson would cause hardship to his mother, the applicant's spouse. Furthermore, because of the Cuban government's restrictive policies, the applicant's family also risks facing financial and emotional hardship upon relocation.

The AAO finds that the applicant's father and spouse would suffer extreme emotional hardship as a result of being separated. Without the applicant in the United States, the applicant's spouse would be left to care for her two children and the applicant's father alone. Because of the applicant's father's medical condition and the medical problems of her son, taking care of these family members on her own would rise to the level of extreme hardship. In addition, given the applicant's father's age and medical condition separating him from his only son, a son that takes care of him on a daily basis, would cause extreme emotional hardship. Thus, taking the hardship to the applicant's qualifying family members in the aggregate the AAO finds that the applicant's spouse and father would suffer extreme hardship as a result of his inadmissibility.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter 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). The BIA has stated:

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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). 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 factor in the present case is the applicant's convictions for grand theft and aiding and abetting the operating of a chop shop. The favorable factors in the present case are the applicant's family ties to the United States; the hardship to the applicant's U.S. citizen wife, children, and father if he were to be denied a waiver of inadmissibility; the applicant's lack of a criminal record or

offense since 2005; and, as indicated by affidavits from his family the applicant's attributes as a father and son.

The AAO finds that the crimes committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, 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.

ORDER: The appeal is sustained.