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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

[redacted]

Date: JAN 03 2012 Office: NEWARK FILE: [redacted]

IN RE: Applicant [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,

Michael Humway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Slovak Republic 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 been convicted of crimes involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and son.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director,* dated May 26, 2009.

On appeal, counsel for the applicant asserts that the applicant's wife and son will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated July 18, 2009.

The record contains, but is not limited to: a brief from counsel; reports on conditions in the Slovak Republic; tax records for the applicant and his wife; statements from the applicant's wife; letters from other individuals in support of the applicant; a psychological evaluation for the applicant's wife; a copy of a deed for the applicant's and his wife's residence; and documentation relating to the applicant's criminal convictions. The entire record was reviewed and considered in rendering this decision.

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.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts

> that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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 present case falls within the jurisdiction of the Third Circuit. To determine whether a crime constitutes a crime involving moral turpitude, we engage in a categorical inquiry that consists of looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute." *Jean-Louis v. Holder*, 582 F.3d 462, 465-66, 2009 WL 3172753 (3rd Cir. October 6, 2009). The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute "fits" within the requirements of a CIMT." *Id.* at 470.

However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true "even where clear sectional divisions do not delineate the statutory variations." *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The record shows that the applicant was arrested on March 29, 2000 and he pled guilty to two counts of receiving stolen property (3rd degree) under New Jersey Statutes § 2C:20-7a, possession of an altered vehicle (3rd degree) under New Jersey Statutes § 2C:17-6b, and theft (3rd degree) under New Jersey Statutes § 2C:20-3a.

At the time of the applicant's convictions, New Jersey Stat. Ann. § 2C:20-7a stated:

> A person is guilty of theft if he knowingly receives or brings into this State movable property of another knowing that it has been stolen, or believing that it is probably stolen. It is an affirmative defense that the property was received with purpose to restore it to the owner.

New Jersey Stat. Ann. § 2C:20-3a provided that "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, immovable property of another with purpose to deprive him thereof."

New Jersey Stat. Ann. § 2C:20-1a states that to deprive another of his or her property means:

> (1) to withhold or cause to be withheld property of another permanently or for so extended a period as to appropriate a substantial portion of its economic value ... or (2) to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it.

In determining whether theft is a crime of moral turpitude, the Board of Immigration Appeals (BIA) considers "whether there was an intention to permanently deprive the owner of his property." *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). New Jersey Stat. Ann. § 2C:20-1a defines the term "deprive" to include withholding property of another permanently or for an extended period so "as to appropriate a substantial portion of its economic value" or "to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it." The AAO finds that the term "deprive" under New Jersey Stat. Ann. § 2C:20-1a indicates an intention to permanently deprive an owner of his property as contemplated by the BIA. The affirmative statutory defense to the crime of receiving stolen property is "that the property was received with purpose to restore it to the owner," which supports that an offense under the section constitutes a permanent taking. Accordingly, the AAO finds that the offenses of which the applicant was convicted under New Jersey Stat. Ann. §§ 2C:20-3a and 2C:20-7a involved moral turpitude, as there was an intention to permanently deprive the owner of the property at issue.

As the applicant's offenses under New Jersey Stat. Ann. §§ 2C:20-3a and 2C:20-7a constitute crimes involving moral turpitude, he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and no purpose is served in also assessing whether his offense of possession of an altered vehicle (3rd degree) under New Jersey Statutes § 2C:17-6b also involved moral turpitude. The applicant does not contest his inadmissibility on appeal, and he 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 and son 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 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).

In a statement dated July 18, 2009, the applicant's wife provided that she was born in Poland on April 4, 1981, and she has lived in the United States as a lawful permanent resident since November 12, 1993. She states that she became a U.S. citizen on May 24, 2001. She explains that she speaks English and some Polish, yet she does not speak other languages. She noted that her family resides in the United States, yet she does not have ties in other countries. She provided that the applicant maintains little contact with his family in the Slovak Republic. She added that her and the applicant's son only speaks English. She explained that she does not currently work, as she stays at home to care for their son. She asserted that the applicant is the sole income provider for their household. She indicated that she and their son are very dependent on the applicant for emotional and economic support, and they would be devastated if the applicant is removed. She expressed that she would like to remain a unified family and raise their son in the United States where he will have better opportunities. She noted that she will try to remain with the applicant and their son regardless of their circumstances.

In a statement dated September 13, 2007, the applicant's wife noted that she and the applicant have been married since November 22, 2004 and that they have a close relationship. She provided that the applicant spends all of his free time with her and their son. She noted that their son has an allergy to peanuts, and she has concern for the level of sensitivity to this condition they would find outside the United States. She asserted that their son would not get an education of comparable quality of in another country. She noted that the applicant has resided in the United States since he was 17 years old, and that returning to Slovakia would be difficult for him.

The record contains a report from a licensed psychologist, regarding the applicant's wife. described the applicant's wife's history and immigration to the United States. noted that the applicant's wife does not have specific vocational skills, yet she was in training to become a beautician as of the date of the report, January 29, 2006. discussed the results of tests administered to the applicant's wife, finding that they indicate that she is experiencing a moderate level of depression, and that she is anxious, she feels vulnerable, and she "does not have the resources to meet [the] demands of the world." found that the applicant's wife "is the kind of person who is easily overwhelmed and may feel further emotional difficulties" should the applicant be removed. recommended that the applicant's wife seek supportive counseling and psychiatric intervention to deal with her depression. added that the applicant's son would be impacted by the applicant's departure, and this would exacerbate the applicant's wife's challenges.

In a brief dated July 18, 2009, counsel asserts that the applicant's wife and son will experience extreme hardship should the waiver application be denied, including emotional and financial difficulty. Counsel discusses the applicant's and his wife's history together. Counsel notes that the applicant is the sole financial provider for their household, and that he works as a sole proprietor of a window and door installing business. Counsel asserts that the applicant's wife has no specific vocational training, and it would be impossible for her to obtain employment in the United States. Counsel adds that the applicant's home is likely worth less than its purchase value, and the applicant's wife cannot rely on the proceeds of its sale to sustain her in the United States. Counsel states that the applicant would be unable to support his wife and son from the Slovak Republic.

Counsel asserts the conditions in the Slovak Republic make it impossible for the applicant's family to relocate there. Counsel states that the Slovak Republic is a developing nation that is recovering from socialist rule, and that it faces economic problems and limited employment opportunities. Counsel contends that the applicant's son would be unable to learn the Slovak language, and his education and assimilation into the local culture there would be delayed. Counsel asserts that the Slovak Republic has banned the use of languages other than the national language, which would create difficulty for the applicant's wife and son.

Counsel notes that the applicant's wife has no ties outside the United States, yet she and the applicant's son are close with her relatives in the United States including her mother, father, sister, and other relatives. Counsel asserts that the applicant has strong ties in the United States.

Upon review, the applicant has not shown that his wife or son will suffer extreme hardship should the present waiver application be denied. The applicant has not established that his wife or son will

endure extreme hardship should they relocate to the Slovak Republic to maintain family unity. Counsel asserts that conditions in the Slovak Republic would create extreme hardship. The AAO has examined the reports provided by the applicant. The U.S. Department of State describes the Slovak Republic as "a rapidly developing European nation" and notes that the GDP growth rate for 2010 was four percent. *Slovakia: Country Specific Information, U.S. Department of State*, dated July 11, 2011; *Background Note: Slovakia, U.S. Department of State*, dated July 11, 2011. While unemployment remains high and it is evident that the Slovak Republic is facing economic challenges as part of the global recession, the applicant has not established that he and his wife would be unable to engage in employment there that would be sufficient to meet their needs. Counsel asserts that the applicant has little contact with his relatives there, yet the record lacks specific explanation regarding the applicant's ties in the country, and the AAO is unable to determine whether he would have contacts there who may assist him and his wife in finding employment and meeting their other needs. Tax records for the applicant and his wife support that his wife has obtained vocational training at the Reignbow Beauty Academy. The applicant has not provided explanation of this training, and the record supports that she has some preparation for employment that may be transferable to the Slovak Republic. The applicant operates a business installing windows and doors, which supports that he has skill in the construction and housing industry that may be utilized in the Slovak Republic.

Counsel asserts that the applicant's wife and son do not speak the national language of the Slovak Republic, and that the country forbids the use of other languages through legislation. However, while the National Council of the Slovak Republic enacted a law[1] creating a preference for the use of the Slovak language in official, professional, and educational settings, the law does not create a ban on the use of other languages including English.

Counsel cites the decision of the Ninth Circuit Court of Appeals in *Watkins v. I.N.S.*, 63 F.3d 844 (9th Cir. 1995), to support his assertion that the applicant's son would face extreme hardship due to an inability to learn the Slovak language. However, it is first noted that the present matter arises within the jurisdiction of the Third Circuit. While the reasoning of the Ninth Circuit is instructive, it is not binding in the applicant's case. Further, the child under consideration in *Watkins v. I.N.S.* had attention deficit hyperactivity disorder (ADHD) that inhibited his ability to sufficiently focus to master a new language. The applicant has not asserted or shown that his son has a learning disability or other condition that would hinder his ability to learn Slovak.

The AAO acknowledges that the applicant's wife has resided in the United States for the majority of her life, and significant emphasis is placed on her ties to the United States. The applicant son has always resided in the United States. The applicant's wife and son have family ties, and it is understood that they would endure emotional difficulty should they become separated from their relatives in the United States. While this constitutes a common consequence of relocation due to inadmissibility, due consideration is given to the challenges they would face in uprooting their lives in the United States.

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[1] Act of the National Council No. 270/1995 Coll. On the State Language of the Slovak Republic, amended in 2009.

It is evident that the applicant and his wife would endure financial consequences in relocating to the Slovak Republic including the loss of the applicant's employment activities in the United States and the loss of the ability to reside in the home that they own. These hardships are given weight, yet the applicant has not shown that they would suffer unusual financial or housing consequences. It is noted that, other than yearly tax filings, the applicant has not submitted detailed documentation regarding his and his wife's financial circumstances, expenses, or assets.

The AAO has examined the report from regarding the applicant's wife's mental health. made observations regarding the applicant's wife's depression, yet his conclusion was primarily based on the possibility that she would become separated from the applicant. Should the applicant's wife relocate to the Slovak Republic, she would not endure separation from the applicant. report is not sufficient to show that the applicant's wife faces general mental health problems that would significantly exacerbate her difficulty should she reside in the Slovak Republic to maintain family unity.

Considering all elements of hardship to the applicant's wife and son in aggregate, the record lacks sufficient evidence or explanation to show that their challenges in the Slovak Republic would rise to the level of extreme hardship.

The applicant has not shown that his wife will suffer extreme hardship should she remain in the United States without him. The applicant has not shown that his wife will endure significant financial detriment without his assistance. The record shows that the applicant has been the source of income for their family. However, the applicant's wife engaged in beautician training, and the applicant has not established that she lacks vocational skills that can be utilized to generate sufficient income to meet her and their son's needs. Further, the applicant has not provided documentation to show his household's expenses, so the AAO is unable to assess the financial requirements his wife may have in his absence. It is understood that meeting the needs of a single-parent household with a young child can be challenging, yet without clear explanation and documentation from the applicant, the AAO is unable to conclude that his wife would suffer unusual economic difficulty.

The AAO has closely examined the record to evaluate the emotional hardship the applicant's wife would face should she remain in the United States. report supports that she suffers from depression, but he does not adequately distinguish her psychological difficulty from that which is commonly faced when spouses reside apart due to inadmissibility. It is noted that report is based on a single visit with the applicant's wife on January 29, 2006, over three years before the present appeal was filed. The applicant has not asserted or shown that his wife required or received care from a mental health professional, after evaluation or at any time. The record contains no assessment of the applicant's wife's mental health conducted within approximately six years. The AAO further observes that the applicant's wife has close relatives in the United States, and she would not be left without significant emotional support should she reside apart from the applicant.

It is evident that the presence of the applicant's son would exacerbate his wife's mental health challenges, and she would likely have additional financial pressure and parenting responsibilities.

She would also share in the hardship faced by their son. While the difficulty faced by the applicant's wife would be substantial, the applicant has not shown that it rises to an extreme level.

The applicant has not shown that his son will face extreme hardship should his son and wife reside in the United States without him. The applicant's son is seven years old, and the record supports that he has been cared for by the applicant's wife as a stay-at-home mother. His household has benefitted from the applicant's financial support, presence, and participation. It is evident that he would lose daily contact with the applicant should the applicant reside in the Slovak Republic. As the applicant's wife would likely be compelled to engage in employment, their son may also undergo a change in his contact with the applicant's wife. However, the field office director noted that the applicant's son was nearing school age which would reduce or eliminate the need for daycare. The applicant's son's school attendance may also afford ample time for the applicant's wife to engage in income generating activities. Though this issue was raised by the field office director, the applicant does not address it on appeal, or otherwise explain the changes that his son would face as a result of his departure.

The AAO acknowledges that the applicant's son would likely endure significant stressors, and that he would face emotional difficulty. However, as with the applicant's wife, he would benefit from the support of close relatives in the United States. Also, the applicant has not shown that his son would lack material support.

The AAO is limited to the explanation and evidence provided by the applicant in determining the hardship his relatives would face. In the absence of clear assertions that are supported by the record, the AAO may not speculate regarding difficulties his relatives may encounter. In proceedings regarding a 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. The applicant has not shown by a preponderance of the evidence that his wife or son will suffer extreme hardship should they remain in the United States.

All stated elements of hardship have been considered in aggregate. Based on the foregoing, the applicant has not shown that denial of his waiver application under section 212(h) of the Act "would result in extreme hardship" to his wife or son. Accordingly, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In the present matter, the applicant has not met his burden to prove that he is eligible for a waiver under section 212(h) of the Act. *See* Section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.