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

U.S. Citizenship and Immigration Services

H2

[redacted]

DATE: JAN 11 2012 OFFICE: MOUNT LAUREL FILE: [redacted]

IN RE: [redacted]

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

ON BEHALF OF PETITIONER:

[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 Hammerry

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mount Laurel, 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 Philippines 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 (INA or 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 her U.S. citizen spouse.

In a decision, dated June 25, 2009, the District Director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of multiple crimes involving moral turpitude. The District Director also found that the applicant failed to demonstrate that her U.S. citizen spouse would suffer extreme hardship as a result of her inadmissibility to the United States and that she failed to demonstrate that she merited a waiver of inadmissibility in the exercise of discretion. The application was denied accordingly.

On appeal, counsel for the applicant does not contest the applicant's inadmissibility, but asserts that the applicant's spouse will indeed suffer extreme hardship as a result of the applicant's inadmissibility.

The record contains, among other documentation, statements by the applicant's spouse, notes from the applicant's spouse's physicians, health records concerning the applicant's spouse, a letter from the applicant's employer, pay stubs for the applicant, photographs of the applicant and her spouse, criminal records for the applicant, articles concerning multiple sclerosis, documentation of the applicant's spouse's employment and real estate assets, and a sampling of bank statements and utility and other bills for the applicant and her spouse.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

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.)

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).

The record shows that the applicant has multiple arrests and convictions. The applicant was first convicted on October 29, 2001, in the Criminal Court of the City of New York, County of Richmond, for [redacted], under New York Penal Law § 155.25, and Criminal Possession of Stolen Property, under New York Penal Law § 165.40. For those convictions, a fine of $250 was imposed and the applicant was sentenced to 15 days imprisonment. The applicant was next convicted in the County Court of the Ninth Judicial District for Orange County, Florida, on February 1, 2002, of Petit Theft, in violation of § 812.014(3)(A) of the Florida Statutes. She was ordered to pay a $100.00 fine, court costs, and to not return to Universal Studios, the scene of offense for six months. Then, on January 2, 2003, the applicant was again convicted in the Criminal Court of the City of New York, County of Richmond, for Petit Larceny, under New York Penal Law § 155.25, and Criminal Possession of Stolen Property, under New York Penal Law § 165.40. She was ordered to pay a fine of $250 and given a conditional discharge of one year.

New York Penal Law § 155.25, states, "[a] person is guilty of petit larceny when he steals property. Petit larceny is a class A misdemeanor." NYPL § 155.05 states, in pertinent part:

> (1) A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

Under NYPL § 155.00, the term "deprive" means "(a) to withhold [property] or cause it to be withheld from [another] permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property."

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."). The AAO notes that although the statute does not make a clear distinction as to whether a conviction under this section of the statute constitutes a permanent or temporary taking, New York courts have found that to establish larcenous intent, a permanent taking must be intended. New York courts have also indicated that larcenous intent is shown when the defendant intends to exercise control over another's property for so an extended period or under such circumstances as to acquire the major portion of its economic value or benefit. See *People v. Jennings*, 69 N.Y.2d 103, 118-122, 504 N.E.2d 1079, 1086-89 (N.Y. 1986). In *People v. Hoyt*, 92 A.D.2d 1079, 461 N.Y.S.2d 569, 570 (N.Y. App. Div. 3rd Dept. 1983) the court found that to warrant a larceny conviction, intent to permanently deprive the owner of his property must be established and that a temporary withholding of property, by itself, would not constitute larcenous intent.

In *Ponnapula v. Spitzer*, the Second Circuit Court of Appeals found that the acts covered by NYPL § 155.00 are permanent takings that manifest larcenous intent. 297 F.3d 172, 183-84 (2nd Cir. 2002). The court observed that while the intent to temporary deprive an owner of property does not constitute larcenous intent, such a temporary deprivation occurs only where a person borrows property without permission with the intent to return the property in full to the owner after a short and discrete period of time. *Id.* at 184. Thus, the AAO finds that the applicant's conviction for [redacted] under New York Penal Law § 155.25 required the intent to permanently take another person's property and is thus a conviction for a crime involving moral turpitude.

The applicant was also convicted of violating New York Penal Law § 165.40, Criminal Possession of Stolen Property in the Fifth Degree, which states that:

> A person is guilty of criminal possession of stolen property in the fifth degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof.
>
> Criminal possession of stolen property in the fifth degree is a class A misdemeanor.

Specifically, to be convicted under § 165.40, a defendant must "knowingly possess[] stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof....." The crime qualifies as a type of larceny or theft, an offense that has long been recognized as involving moral turpitude. *Michel v. INS*, 206 F.3d 253, 263-64 (2d Cir. 2000) (affirming this Board's determination that fifth-degree criminal possession of stolen property in violation of New York Penal Law § 165.40 is a crime involving moral turpitude).

The applicant was convicted under each of the above mentioned statutes on two occasions. As such, the applicant is inadmissible under INA § 212(a)(2)(A)(i)(I) of the Act. It is not necessary to determine whether her conviction for Petit Theft under Florida Statutes § 812.014, also qualifies as a crime involving moral turpitude, as the applicant is clearly inadmissible for her convictions in New York.

As a person found to be inadmissible under section 212(a)(2)(A) of the Act, the applicant is eligible to apply for a waiver under section 212(h) of the Act.

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

The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if –

> (1) (A) . . . it is established to the satisfaction of the Attorney General 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 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 . . .

As it has not been 15 years since the time of the activities that led to the applicant's inadmissibility, she must illustrate that the denial of her admission would result in extreme hardship to a qualifying relative. In this case, the applicant's qualifying relative is her U.S. citizen husband. Although the applicant appears from the record to have children and stepchildren residing in the United States, she has not indicated whether they are U.S. lawful permanent

residents or citizens nor has she provided any evidence in regards to hardship those children would suffer. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and the AAO 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 illustrates that applicant's U.S. citizen husband suffers from multiple sclerosis and diabetes. The doctor's letters in the record concerning the applicant's spouse's condition, however, state that his condition is presently stable and that he is able to function independently. The record indicates that the applicant's spouse's condition may deteriorate and he may eventually require full-time care to meet his daily needs, but there is no evidence that he needs that type of care at this time. The applicant's spouse states that his condition is stable at this time because he knows that he can count on the applicant to tend to his needs when she is not working, but this statement is not supported by any detail about what support the applicant provides to her spouse or by any independent evidence from a medical professional that the stability of his condition is dependent on the applicant's support. The applicant also states that the departure of his wife would cause him stress, which would in turn negatively affect his medical condition. The documentation submitted by the applicant on appeal, however, clearly states that there is no evidence that stress causes the symptoms of multiple sclerosis to deteriorate. Rather, the evidence submitted states that there is a correlation between stress and multiple sclerosis, but no causal link.

The applicant's attorney has stated that the applicant will be "an integral part of the medical care of her spouse" due to the applicant's experience as a certified nursing assistant and due to her "demonstrated professionalism, dedication and good bedside manner." The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980). Aside from the applicant's vague statements that his wife "tends to his needs," there is no independent evidence in the record to illustrate that the applicant provides any essential care to the applicant at this time or that she has committed to do so in the future. The doctor's letters do not indicate the role of the applicant in her spouse's care, nor is there any indication from the applicant herself, friends, neighbors, community members or other members of the family that the applicant plays a role in maintaining the applicant's current stable condition or that she would be instrumental to his care in the future. The AAO acknowledges that the applicant's U.S. citizen spouse will experience some hardship if he remains in the United States without the applicant, but the applicant has failed to demonstrate that this hardship, even when combined with other hardship factors, will be extreme.

Additionally, there is no evidence in the record that the applicant's spouse would suffer financial hardship if he were separated from the applicant. The record indicates that the applicant's spouse earned $72,674.79 in 2007. That same year, the applicant's income was $16,710.28. The applicant's spouse owns property and a bank statement submitted indicated that there was a balance of $24,745.52 on May 9, 2008 in the applicant and her spouse's checking account. There is very little documentation in the record to indicate the applicant's spouse's expenses. Based on the information provided, there is no reason to believe that the applicant's spouse would suffer financial hardship if separated from the applicant.

We must also consider whether the applicant's U.S. citizen spouse would suffer extreme hardship should he relocate to the Philippines. There is no evidence in the record that the applicant could not obtain monitoring of his medical conditions abroad or that he would be unable to pay for medical care abroad. The applicant's attorney states that the quality of healthcare is not comparable in the Philippines, however no evidence is provided to illustrate that the applicant could not obtain the care he needs in that country. Moreover, the applicant's attorney states that the applicant's spouse's health care coverage will not cover treatment in the Philippines, but no evidence is provided to support this assertion. In fact, there is no evidence in the record that the applicant has medical insurance in the United States, what that medical insurance is, and what it covers. Again, the statements of counsel cannot be taken as evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980). Although the record indicates that the applicant's spouse has been employed by the same company since 1993, there is no indication in the record that he could not meet his financial needs with his current assets or through employment abroad if he were to depart the United States. The applicant's spouse does not put forth any evidence to indicate that he would suffer emotional or physical hardships were he to depart the United States. All evidence in the record of hardship to the applicant's spouse should he relocate to the Philippines has been considered in aggregate. Based on the foregoing, the applicant has not shown that her husband will endure extreme hardship should he join her abroad.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's U.S. citizen spouse will face extreme hardship if the applicant is not granted a waiver of inadmissibility. Although the AAO acknowledges that the applicant's U.S. citizen spouse will suffer hardship, the record does not establish that the hardship he would face rises to the level of "extreme" as contemplated by statute and case law. Having found the applicant statutorily ineligible for relief under section 212(h) of the Act, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met her burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.