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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

[redacted]

H2

Date: JAN 17 2012 Office: MANILA 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 Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Manila, the Philippines, 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 (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his lawful permanent resident mother.

The 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 Director,* dated July 17, 2009.

On appeal, counsel for the applicant asserts that the applicant's mother will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated September 16, 2009.

The record contains, but is not limited to: briefs from counsel; statements from the applicant's mother, uncles, siblings, nieces, and family friends; medical documentation for the applicant's mother; reports on conditions in the Philippines; documentation in connection with the applicant's criminal history; documentation of the applicant's mother's transfer of funds to the Philippines; and documentation relating to the applicant's professional training. The entire record was reviewed and considered in rendering this decision.

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

> Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
>
> (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.
>
> (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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the

alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record shows that the applicant was convicted of second degree commercial burglary under California Penal Code §§ 459 and 460(b) for his conduct on or about April 12, 1999, and petty theft under California Penal Code §§ 484 and 488 for his conduct on or about December 2, 1998.

At the time of the applicant's conviction for petty theft, Cal. Penal Code § 484(a) provided, in pertinent part:

> Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

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 Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). There is ample support that the applicant's act of petty theft constitutes a crime involving moral turpitude.

At the time of the applicant's conviction for second degree commercial burglary, Cal. Penal Code § 459 provided, in pertinent part:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

At the time of the applicant's conviction for second degree commercial burglary, Cal. Penal Code § 460 provided, in pertinent part:

> 1. Every burglary of an inhabited dwelling house or trailer coach as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.
>
> 2. All other kinds of burglary are of the second degree.

The Board of Immigration Appeals (BIA) has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). The Ninth Circuit Court of Appeals has similarly held that burglary with the intent to commit theft is a crime involving moral turpitude. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005)("Because the underlying crime of theft or larceny is a crime of moral turpitude, unlawfully entering a residence with intent to commit theft or larceny therein is likewise a crime involving moral turpitude."). The record of conviction indicates that the applicant was convicted for burglary in the second degree with the intent to commit larceny. Thus, the applicant's conviction is for a crime involving moral turpitude.

As the applicant has been convicted of two crimes involving moral turpitude, he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and he requires a waiver under section 212(h) of the Act. The applicant does not contest his inadmissibility on appeal.

The record further shows that the applicant was charged with possession of an opium pipe under California Health and Safety Code § 11364 for his conduct on or about May 26, 1998. The applicant

has not provided complete documentation associated with this charge, and the AAO is unable to clearly ascertain the criminal procedure that led to its disposition. However, the record shows that the applicant was permitted to enter a diversion program in lieu of prosecution. If the applicant entered a plea of guilty or nolo contendere, or admitted sufficient facts to warrant a finding of guilt, his participation in the diversion program would constitute a conviction for immigration purposes. Section 101(a)(48)(A)(i) of the Act. It is noted that California's deferred entry of judgment program under Cal. Penal Code § 1000 requires a guilty plea to the controlled substance charge in order to participate. It is likely that the applicant pled guilty to possession of an opium pipe in order to participate in a diversion program. If so, his charge and proceedings under California Health and Safety Code § 11364 constitute a conviction, and he is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for violating any law relating to a controlled substance.

The applicant's offense of possession of an opium pipe does not relate to simple possession of 30 grams or less of marijuana. Therefore, if he received the equivalent of a conviction, which appears likely from the record, he is statutorily ineligible for a waiver of his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. If the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for possession of an opium pipe, he may not be admitted to the United States, irrespective of whether he establishes that he is eligible for a waiver under section 212(h) of the Act for having committed crimes involving moral turpitude. However, as the AAO lacks complete documentation associated with his charge under California Health and Safety Code § 11364, we will assess his eligibility for 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 mother is the only qualifying relative 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 December 27, 2008, the applicant's mother explained that the applicant is her youngest child and that, while he made mistakes while in the United States, he returned to the Philippines and became a registered nurse. She expressed that she worries about the applicant in the Philippines. She noted that she is 74 years old, yet she still works and provides economic support for the applicant. She stated that she takes medications for high blood pressure, high cholesterol, and depression. She provided that waiting for the applicant has affected her emotionally and physically, and that she laments that his past mistakes continue to affect his life.

The applicant submitted letters from his uncles, cousins, nieces, and siblings who attests to his good character, and the emotional hardship his mother is experiencing due to his absence from the United States. They explained that the applicant's mother has worked in the United States in order to support the applicant's efforts to become a registered nurse in the Philippines.

In a brief dated September 16, 2009, counsel asserts that the applicant's mother will suffer extreme hardship should the applicant remain outside the United States. Counsel contends that the applicant, being the youngest child without a family of his own, will be able to care for his mother should he reside in the United States. Counsel asserts that the applicant's brothers and sisters have families of their own and they are unable to care for the applicant's mother. Counsel states that the applicant's family is close knit and very traditional, and that they do not wish to relocate the applicant's mother to a nursing home. Counsel asserts that the applicant's mother sends money to the applicant in the Philippines, and that continued separation will cause her significant financial hardship. Counsel indicates that the applicant's mother will not be able to fund traveling to the Philippines to visit the applicant, and she will not have enough time off of work to do so.

Counsel takes issue with the director's characterization of the applicant's mother's family separation as self-imposed, and asserts that family separation is a paramount consideration in assessing hardship to the applicant's mother. Counsel contends that the director failed to give adequate weight to other factors that impact the applicant's mother's difficulty, including her lengthy lawful permanent residence in the United States of over 13 years, the applicant's inability to immigrate to the United States by other means, and the applicant's inability to support his mother financially from

the Philippines. Counsel discusses the applicant's mother's medical needs, and asserts that the applicant's absence is the cause of her health problems.

Upon review, the applicant has not shown that his mother will suffer extreme hardship should the present waiver application be denied. The applicant submitted medical records for his mother, dated December 31, 2008 and earlier. The documents show that his mother has experienced anxiety, depression, dizziness, and insomnia. The applicant submitted documentation of his mother's medications, dated January 3, 2009 and earlier. The record contains a letter from , dated November 29, 2007, that reports that his mother has been treated with medication for high blood pressure, high cholesterol, and depression. The letter indicates that the applicant's mother was distressed over the applicant's inability to return to the United States, and that her depression was exacerbating her medical problems. However, the applicant has not submitted a clear description of his mother's health status from a medical professional in over four years.

The AAO has carefully examined the medical records for the applicant's mother, yet we are unable to determine the severity of her conditions, or the impact her health status has on her ability to perform common functions. Despite the applicant's mother's age, the record indicates that she continues to work at a department store. This fact supports that she is capable of performing daily functions and acting with independence. The applicant has resided outside the United States since 1999, and he has not asserted that his mother has required assistance or experienced unmet need in his absence. The applicant submitted letters from one of his brothers and one of his sisters, as well as other relatives, yet none of them have asserted that his mother required assistance from their family. Thus, the record does not support that the applicant's mother requires his help.

Counsel asserts that the applicant's mother will continue to endure economic difficulty should the applicant remain in the Philippines, in part due to her continued support of him. However, the record indicates that the applicant's mother provided financial assistance to him so that he could complete nursing training. As he has realized his goal of becoming a registered nurse, it appears the purpose of his mother's economic support has concluded, and there is no longer a reason for her to transmit funds to him in the Philippines. It is noted that the applicant has not provided any information regarding his employment in the Philippines, such as whether he now works as a registered nurse and earns income. Nor has the applicant provided any information regarding his mother's assets, income, or financial needs in the United States. Thus, the record does not support that his mother is facing financial hardship due to his absence from the United States.

It is evident that the applicant's mother is experiencing emotional difficulty due to the applicant's inadmissibility, and the AAO acknowledges the impact psychological hardship has on one's physical health. Yet, as discussed above, the record does not support that the applicant's mother is experiencing health problems that rise to an extreme level. The applicant has not shown that his presence would significantly improve her condition. It is evident that the separation of parents and adult children often results in significant emotional difficulty. However, the applicant has resided apart from his mother for approximately 12 years, and he has not shown that the psychological consequences for his mother have risen to an extreme level.

Based on the foregoing, the applicant has not shown that his mother will suffer extreme hardship should she remain in the United States and he reside in the Philippines.

The applicant has also not shown that his mother will suffer extreme hardship should she relocate to the Philippines. The AAO acknowledges that the applicant's mother has been a lawful permanent resident for a lengthy period, and abandoning her permanent residence would constitute a significant hardship. The record also supports that the applicant's mother has extensive family in the United States, including siblings and other adult children, and separating from them would create emotional difficulty for her. It is evident that the applicant's mother would be compelled to relinquish her employment and residence in the United States should she reside in the Philippines. The applicant's mother receives medical care in the United States, and she would be separated from the professionals who are familiar with her needs should she relocate abroad. These factors are given significant weight.

However, while the applicant's mother has been a lawful permanent resident of the United States for a lengthy period, she is a native and citizen of the Philippines, and the applicant has not shown that she would face the challenge of adapting to an unfamiliar language and culture there. The applicant has not described his circumstances in the Philippines, or established that he experiences difficulty there. As noted above, the applicant has not indicated whether he utilizes his training to work as a registered nurse. Nor has the applicant indicated whether he has other family in the Philippines. The AAO is unable to determine his financial circumstances, or to assess whether he has difficulty accessing medical care. This lack of information is significant, because the applicant's circumstances inform an understanding of the experience his mother would have should she join him. The AAO has examined the reports provided by the applicant on conditions in the Philippines, yet they do not show that all individuals residing there endure challenges that rise to an extreme level. Without specific discussion relating the reports to the applicant's and his mother's potential circumstances, the AAO is unable to find that his mother would face difficulty relating to human rights abuses, security matters, and economic problems.

In the absence of clear assertions from the applicant, the AAO may not speculate regarding hardships his mother may face in the Philippines. In proceedings regarding a waiver of grounds of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. As presently constituted, the record does not show that his mother would endure hardship in the Philippines that rises to an extreme level.

All elements of hardship to the applicant's mother have been considered in aggregate. Based on the foregoing, the applicant has not shown that denial of his waiver application will result in extreme hardship to his mother, whether she remains in the United States or joins him abroad. Thus, the applicant has not shown that he is eligible for a waiver under section 212(h) of the Act. 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.