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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 2 0 2012 Office: NEW YORK, NY 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.

Thank you,

For

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Panama 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. Counsel does not dispute the finding of inadmissibility. The applicant's son is a U.S. citizen and her mother is a lawful permanent resident. 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.

The director found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. *Director's Decision*, dated June 19, 2009.

On appeal, counsel asserts that the applicant's qualifying relatives would experience extreme hardship should the application be denied. *Form I-290*, received July 22, 2009.

The record includes, but is not limited to, counsel's brief, the applicant's statement, the applicant's mother's statement, medical and educational records, and country conditions information. The entire record was reviewed and considered in arriving at 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).

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. 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.

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. 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 reflects that the applicant was convicted of larceny under New York Penal Law § 155.25. on October 11, 2000, May 18, 2003, May 10, 2005, April 25, 2006, and attempted petty larceny under New York Penal Law § 110-155.25 on May 10, 2005.

New York Penal Law § 110.00 states, "a person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." New York Penal Law § 155.25, states, "[a] person is guilty of petit larceny when he steals property.

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 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 convictions for attempted petit larceny under New York Penal Law § 110-155.25 and petit larceny under New York Penal Law § 155.25 required the intent to permanently take another person's property and are thus convictions for crimes involving moral turpitude.

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

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

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

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

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives in this case are the applicant's mother and child. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (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,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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).

Counsel states that the applicant's mother suffers from hypertension and depression; and she underwent a colonoscopy that revealed polyps. *Brief in Support of Appeal*, dated July 20, 2009. The applicant's mother states that she had cancerous polyps and had them removed; she has seen many types of doctors in a short period of time; she has a fibroid tumor; and she lost a son and that brought her down to nothing. *Applicant's Mother's Statement*, undated.

The applicant states that her son does not speak Spanish; his opportunities, including educational, would shrink dramatically in Panama; he would probably suffer from culture shock; and she does not want him exposed to crime and violence in Panama. *Applicant's Second Statement*, dated July 16, 2009. The applicant states that her son will be separated from the only school and community that he knows; he would have a difficult time adjusting to a foreign language and culture; he has lived in the United States his entire life; he would not want to leave his friends and fellow students; and he adores her mother and will be traumatized if he is forced to separate from her. *Applicant's Statement*, dated May 19, 2009. Counsel states that the applicant's son is experiencing a lack of concentration in school and anger issues; he lacks a father figure as his father is not involved in his life; he has a history of problems in school; lacking concentration and a father figure will influence his life in a country where resources are not abundant; many children in Panama do not attend school due to lack of transportation and scarcity of secondary schools; and he will face the danger of gangs. *Brief in Support of Appeal*. The record reflects that the applicant's son was held over in first grade; he has struggled with anger issues; and he needs the extra push from teachers and parents to remain focused. *School Letter*, dated June 29, 2009. The record includes country conditions information on Panama related to educational, and other human rights, issues.

The record reflects that the applicant's son is 11 years old, he does not speak Spanish and he is integrated into his community. The AAO notes that the BIA found that a fifteen-year-old child who lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). In addition, the record reflects that the applicant's son has had anger issues and he would be separated from his grandmother. The AAO also notes the general country conditions information submitted and that educational opportunities will likely be lost upon relocation. Considering these factors, and the normal results of relocation, the AAO finds that the applicant's son would experience extreme hardship upon relocation to Panama.

Counsel states that the applicant's mother suffers from hypertension and depression; she underwent a colonoscopy that revealed polyps; she has threatened to kill herself if the applicant moves to Panama; she depends on the applicant to cook, clean, take her to doctor appointments and obtain her prescriptions; she provides her emotional care; and her depression will worsen without the applicant and the applicant's son. *Brief in Support of Appeal.*

The applicant makes similar claims as counsel and she states that she has to cook for her mother as she has become forgetful; her mother left the stove on in the apartment the last time she cooked, resulting in a fire; she is the only who takes care of her mother; and her mother adores her son. *Applicant's Second Statement.*

The applicant's mother states that the applicant is in charge of giving her medicine; sometimes she cannot remember if she has taken her medicine; she cooks and cleans for her; she helps get her out of deep depression; she had cancerous polyps and had them removed; she has seen many types of doctors in a short period of time; she has a fibroid tumor; all of the medical issues are too much for her to handle by herself; she lost a son and that brought her down to nothing; and she cannot care for her grandson due to her unstable condition. *Applicant's Mother's Statement.* The applicant's mother's medical records reflect that she had two diminutive polyps and small hemorrhoids; she has hypertension; she has taken numerous medications; she has major depression; and she has gone for psychotherapy. The applicant's mother's physician states that the applicant's mother suffers from severe depression, chronic bronchitis and hypertension; the applicant helps her with her medications, cooking, cleaning and keeping appointments. *Letter from* , dated May 15, 2009. The applicant's mother's psychologist states that the applicant's mother is severely depressed and can function only due to the applicant; she has threatened suicide if the applicant is removed and he takes that threat very seriously; and he is concerned for her safety. *Letter from* dated June 29, 2009.

Counsel states that the applicant's son is experiencing a lack of concentration in school and anger issues; he lacks a father figure as his father is not involved in his life; and he has a history of problems in school. *Brief in Support of Appeal.* The record reflects that the applicant's son was held over in first grade; he has struggled with anger issues; and he needs the extra push from teachers and parents to remain focused. *School Letter.* The applicant states that her son's father abandoned her when she was pregnant and her mother could not care for him. *Applicant's Statement.*

The record reflects that the applicant's son would be separated from his mother if she returned to Panama. The record reflects that the applicant's son's father is not involved in his life. In addition, the applicant's son has struggled with anger issues. The applicant's son would be separated from his mother, his only involved parent, in the event that she resided in Panama. The AAO notes that given the applicant's mother's significant medical and psychological issues, the record reflects that she may not be able to care for the applicant's son in the applicant's absence. Considering these factors, and the normal results of separation, the AAO finds that the applicant's son would experience extreme hardship upon remaining in the United States.

As the AAO has found extreme hardship to the applicant's son, it will not make a determination in regard to the applicant's mother.

In *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

> 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).

*Id.* at 301.

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 factors in the present case are the criminal convictions for theft, a 2008 disorderly conduct conviction and her unauthorized period of stay.

The favorable factors are the extreme hardship to the applicant's son and the hardship to her mother, and good moral character as evidenced by letters in the record.

The AAO finds that the crimes committed by the applicant are serious in nature; nevertheless, when taken together, we find 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

**ORDER:** The appeal is sustained and the waiver application is approved.