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U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
Office of Administrative Appeals MS 2090  
20 Massachusetts Avenue, N.W., MS 2090  
Washington, DC 20529-2090  
**U.S. Citizenship  
and Immigration  
Services**



H2

Date: **JUL 10 2012**

Office: MIAMI, FLORIDA

FILE: 

IN RE: Applicant: 

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew  
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Colombia. He 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. The director stated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. Furthermore, the director denied the waiver application as a matter of discretion.

On appeal, counsel asserts that the director failed to specify the basis for inadmissibility and the AAO is not able to completely review the director's decision where the underlying decision does not address which crimes render the applicant inadmissible. Counsel argues that the applicant's theft, battery, and providing a false name to a law enforcement officer are the crimes that might involve moral turpitude. Counsel states that the applicant committed crimes (simple assault, disorderly conduct, petty theft, grand theft, false identification to a law enforcement officer and felony battery) due to an untreated mental illness.

Counsel contends that the instant case arises in the Eleventh Circuit Court of Appeals and that Fla. Stat. § 812.014, the theft statute under which the applicant was convicted, is divisible, encompassing permanent takings as well as temporary appropriations. Counsel asserts that in view of *Jaggernaut v. U.S. Attorney General*, 432 F.3d 1347, (11<sup>th</sup> Cir. 2005), a temporary appropriation is not equivalent to a permanent taking. 432 F.3d at 1353-1354. Counsel argues that in *Matter of V-Z-S*, 22 I&N Dec. 1338, n.12 (BIA 2000), and *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973), the Board of Immigration Appeals (Board) held that crimes of theft involve moral turpitude only where a temporary taking is intended. Counsel asserts that the applicant "operated under the cloud of mental illness and was not in a position to establish specific intent to deprive or take property." Counsel cites *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), and argues that the applicant's "offenses did not include a specific intent to deprive another of property, but rather . . . his only intent was to appropriate – which is not a categorical "theft" offense." Counsel contends that because the applicant's record of conviction does not specify under which subsection of Fla. Stat. § 812.014 the applicant was convicted or establish that he had a specific intent to take or deprive another person of property the applicant was not convicted of a crime involving moral turpitude.

Counsel asserts that in regard to the assault and battery convictions, *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), and *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), indicate that simple assault or battery is not a crime involving moral turpitude and that "touching" another person is not morally turpitudinous. Counsel argues that the applicant's felony battery conviction was, in essence, simple battery which was enhanced to a felony because the victim was over 65 years old. Counsel states that subsection (1)(a)1 of Florida's simple battery statute, Fla. Stat. § 784.03, does not have as an element the specific intent to cause bodily harm, and encompasses touching or striking another person without any resultant harm. Counsel asserts in view of the modified categorical approach, which entails analyzing the statutory elements of the criminal statute and the facts in the record of

conviction, it cannot be concluded that the applicant's battery offense constitutes a crime involving moral turpitude.

Counsel argues that providing a false name to a law enforcement officer in violation of Fla. Stat. § 901.36(1) does not have as an element an intent to deceive, and consequently is not a crime involving moral turpitude.

Counsel asserts that the applicant's mother will experience extreme emotional hardship if separated from the applicant because the applicant depends on her. Counsel states that the applicant has a mental illness requiring treatment and the applicant's mother and brother are diligent in ensuring that the applicant takes medication and attends counseling. Counsel describes the applicant as living with an aunt, walking to work, and visiting his mother daily. Counsel indicates that the applicant is no longer homeless and is happy and functioning and that it would be emotionally devastating for the applicant's mother if the applicant was deported to Colombia. Counsel argues that the applicant's mother cannot relocate to Colombia because she is married to a U.S. citizen, has another son in the United States, owns property here, has a job, and pays for a sizable amount of the applicant's medication and medical treatment. Counsel states that the applicant's mother left Colombia over 20 years ago due to its violence and instability.

Counsel contends that the director erred in not interviewing the applicant before denying the waiver application. Counsel asserts that 8 C.F.R. § 245.6 provides that adjustment of status applicants are to have an interview with an immigration officer. Counsel conveys that the officer who interviewed the applicant and his mother in 2006 left the Miami office and officers who never met the applicant handled his case. Counsel states that in the instant case the officer denied the adjustment application and Form I-601 based on the finding that the applicant still has a temper and might be violent, the applicant's mother will not suffer extreme hardship without her son, and that granting the application in the exercise of discretion was not warranted. Counsel argues that in view of the nuances of the applicant's case, it was an abuse of discretion for an officer, who never met the applicant, to make those findings. Counsel asserts that the physician with Center for Disease Control determined that the applicant is not dangerous, violent, or a threat to the public.

The applicant was found to be inadmissible for having been convicted of a crime involving moral turpitude. We note that although the director provided an extensive list of the applicant's arrests and convictions, it is not clear which, if not all, of the applicant's convictions were found to be crimes involving moral turpitude. Section 212(a)(2)(A)(i)(I) 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

Based on the record before the AAO, the applicant has following convictions:

<u>CONVICTION DATE</u>	<u>CRIME</u>	<u>DISPOSITION</u>
March 31, 2000	Petit Larceny, Theft	Withheld adjudication
March 31, 2000	Resisting Arrest W/O Violence	Withheld adjudication
March 28, 2001	Grand theft	Pay fine and costs
November 29, 2001	Petit Larceny, Theft	Unknown
November 29, 2001	Disorderly Conduct	Pay fine and costs
February 12, 2002	Disorderly Conduct	Pay fine and costs
October 11, 2002	Disorderly Conduct	Pay fine and costs
December 19, 2002	Disorderly Conduct	Pay fine and costs
January 3, 2003	Disorderly Conduct	Pay fine and costs
January 29, 2003	Disorderly Conduct	Pay fine and costs
March 12, 2003	Assault or Battery	Pay fine and costs
July 12, 2003	Disorderly Conduct	Pay fine and costs

Although counsel stated that the applicant was convicted of simple assault, the submitted document from the clerk of the circuit and county court of the Eleventh Judicial Circuit of Florida Circuit, which sets forth the crimes of which the applicant was charged, does not list a separate crime.

The applicant was convicted of battery of a 65-year-old person in violation of sections 784.03, 784.08(2), and 775.087 of the Florida Statutes.

Section 784.03 of the Florida Statutes provides, in pertinent part:

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

Fla. Stat. Ann. § 784.08 (2) provides:

Whenever a person is charged with committing an assault or aggravated assault or a battery or aggravated battery upon a person 65 years of age or older, regardless of whether he or she knows or has reason to know the age of the victim, the offense for which the person is charged shall be reclassified as follows:

. . . .

(c) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

Under Florida Statutes § 784.03, the offense of battery occurs when a person actually or intentionally touches or strikes another person against the will of the other; or intentionally causes harm to another person. The Eleventh Circuit has held that aggravated battery, which includes the use of a deadly weapon or when the battery results in serious bodily injury, is a crime involving moral turpitude. However, simple battery is not a crime involving moral turpitude. *See Sosa-Martinez v. U.S. Atty. Gen.*, 420 F.3d 1338, 1342 (11<sup>th</sup> Cir. 2005). Aggravated forms of battery are under provisions of Florida law distinct from section 784.03. *See, e.g.*, Fla. Stat. §§ 784.041, 784.045, 784.07, 784.074-085. It is unclear from the record of conviction whether the applicant was convicted for intentionally causing bodily harm, or for merely intentionally touching or striking another person against that person's will. We recognize that assault and battery crimes have also been found to be morally turpitudinous where there is intentional conduct resulting in a meaningful level of harm and where aggravating factors are present. *See, e.g., Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007). The Board has also found:

[M]oral turpitude necessarily inheres in assault and battery offenses that are defined by reference to the infliction of bodily harm upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer, because the *intentional or knowing infliction of injury* on such persons reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection.

*Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006) (emphasis added).

In the instant case, the applicant's battery involved an aggravating factor as his victim was a person who was 65 years old, which is a specially protected individual under Florida law. However, the Board has not specifically found this to be an aggravating factor that renders an otherwise simple battery to be assault of the kind that exhibits moral turpitude. We must note also that Fla. Stat. Ann. § 784.08 (2) doesn't require knowledge of age, and the record of conviction does not indicate that the applicant was aware of the age of his victim. As the applicant was convicted under a statute the language of which encompasses simple battery, we will not conclude on the present record that the applicant's conviction for battery is a crime involving moral turpitude.

The applicant was convicted of disorderly conduct in violation of Fla. Stat. § 509.143, which provides:

Disorderly conduct on the premises of an establishment; detention; arrest; immunity from liability.—

- (1) An operator may take a person into custody and detain that person in a reasonable manner and for a reasonable time if the operator has probable cause to believe that the person was engaging in disorderly conduct in violation of § 877.03 on the premises of the licensed establishment and that such conduct was creating a threat to the life or safety of the person or others. The operator shall call a law enforcement officer to the scene immediately after detaining a person under this subsection.
- (2) A law enforcement officer may arrest, either on or off the premises of the licensed establishment and without a warrant, any person the officer has probable cause to believe violated § 877.03 on the premises of a licensed establishment and, in the course of such violation, created a threat to the life or safety of the person or others.

. . .

- (4) A person who resists the reasonable efforts of an operator or a law enforcement officer to detain or arrest that person in accordance with this section is guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083, unless the person did not know or did not have reason to know that the person seeking to make such detention or arrest was the operator of the establishment or a law enforcement officer.

The statute at Fla. Stat. § 877.03, referenced above, states:

Breach of the peace; disorderly conduct.--Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

Disorderly conduct generally is not a crime involving moral turpitude where evil intent is not necessarily involved. *See Matter of S-*, 5 I&N Dec. 576 (BIA 1953); *Matter of P-*, 2 I&N Dec. 117 (BIA 1944); and *Matter of Mueller*, 11 I&N Dec. 268 (BIA 1965). However, we note that the crime of disorderly conduct may encompass a broad array of criminal conduct.

For instance, Fla. Stat. § 509.143 encompasses conduct that is in the nature of battery, a crime which may or may not involve moral turpitude as previously discussed. Fla. Stat. § 509.143 encompasses disorderly conduct that also creates a threat to the life or safety of the person or others, and we are not persuaded that it does not reach conduct lacking in evil intent.

Thus, we will review the applicant's record of conviction from which we may determine whether the applicant's disorderly conduct offenses are for crimes involving moral turpitude. In regard to the July 12, 2003 conviction, the complaint/arrest affidavit stated that the applicant was at a food establishment and had in a verbal dispute with a homeless man and struck the man. Patrons near the incident left their tables in fear due to the applicant's conduct. The complaint/arrest affidavit for the January 29, 2003 conviction stated that the applicant had a verbal argument with a man and then started a fist fight, knocking over store merchandise and endangering employees and customers. However, the complaint/arrest affidavits do not reflect that the applicant's actions caused bodily harm to any person, or that he had specific intent to cause harm. The complaint/arrest affidavits for the applicant's other disorderly conduct convictions reflect that these did not involve harm to others. Accordingly, in view of the records of conviction, to the extent presented in the record before the AAO, we find that there is insufficient basis to find that the disorderly conduct convictions offenses are crimes involving moral turpitude.

The applicant was convicted of theft in violation of Fla. Stat. § 812.014, which statute provides:

- (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
  - (a) Deprive the other person of a right to the property or a benefit from the property.
  - (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

We agree with counsel that the Florida statute under which the applicant was convicted involves both temporary and permanent takings. A plain reading of Fla. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. Counsel argues that in view of *Jaggernaut*, a temporary appropriation is not equivalent to a permanent taking and that *Matter of V-Z-S* and *Matter of Grazley* indicate that crimes of theft involve moral turpitude only where a temporary taking is intended. Counsel's arguments are not persuasive because in *Jaggernaut* the Eleventh Circuit addressed whether grand theft under Florida Statutes § 812.014(1) constituted an aggravated felony under § 101(a)(43)(G) of the Act. 432 F.3d 1346 at 1348. Similarly, in *Matter of V-Z-S*, the Board addressed what constitutes a "theft offense" for purposes of section 101(a)(43)(G) of the Act. 22 I&N Dec. 1338 at 1341-1342. In the case at hand, we are examining whether the crime of theft under Florida law involves moral turpitude under section 212(a)(2)(A)(i)(I) of the Act and not whether it is an aggravated felony. Although counsel

cites *Matter of Grazley*, she incorrectly states that that decision stands for the proposition that a temporary taking is a crime involving moral turpitude. In *Matter of Grazley*, to constitute a crime involving moral turpitude a theft offense must require the intent to *permanently* take another person's property. The Board stated: "Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended." 14 I&N Dec. at 333. Therefore, as Fla. Stat. § 812.014 involves both temporary and permanent takings, the AAO cannot find that a violation of the theft statute is categorically a crime involving moral turpitude.

Since Fla. Stat. § 812.014 includes conduct that would categorically be grounds for inadmissibility as well as conduct that would not, we will review the record of conviction, which includes the charging document, plea, verdict, and sentence, to determine whether the applicant was convicted of a crime involving moral turpitude. 659 F.3d at 1305. Counsel cites *Matter of Silva-Trevino, supra*, and argues that the applicant's "offenses did not include a specific intent to deprive another of property, but rather . . . his only intent was to appropriate – which is not a categorical "theft" offense." Counsel contends that the conviction records do not specify under which subsection of Fla. Stat. § 812.014 the applicant was convicted, and that the record of conviction therefore does not establish a specific intent to take or deprive another person of property. However, the statutes does require the intent to deprive or appropriate, either temporarily or permanently, and the relevant distinction for inadmissibility purposes is not between the intent to deprive as opposed to the intent to appropriate, but in whether the intent to deprive or appropriate was of a permanent or temporary nature. Regardless, the record of conviction indicates that the applicant's intent was to deprive, not appropriate.

The information stated that the applicant "did unlawfully and knowingly obtain or use, or endeavored to obtain or use shoes and/or clothing and/or other merchandise . . . the property of Burdines and/or Damiam Carricaburu, . . . with the intent to either temporarily or permanently deprive said owner or custodian of a right to said property." Thus, it appears the applicant stole merchandise and was convicted of retail theft.

In *In re Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The reasoning in *Jurado-Delgado* is applicable to the applicant's case as he stole merchandise. The applicant is thus inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude.

The applicant was also convicted of petit theft in violation of Fla. Stat. § 812.014 on March 31, 2000 and November 29, 2001. The applicant has not submitted his entire record of conviction, which might describe the basis for the conviction. Additionally, the applicant has not established in accordance with the requirements of 8 C.F.R. § 103.2(b)(2) that the documents comprising the record of conviction are unavailable. In proceedings for 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. The applicant has the burden of demonstrating by means of the record of conviction that his crime did not involve moral turpitude. Thus, the record, as such, does not demonstrate that the applicant's theft offenses are not morally turpitudinous. Accordingly, based on the record, we cannot find that the theft convictions on March 31, 2000 and November 29, 2001 are

not for crimes involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was convicted of giving a false name to a law enforcement officer in violation of Fla. Stat. § 901.36, which states the following:

(1) It is unlawful for a person who has been arrested or lawfully detained by a law enforcement officer to give a false name, or otherwise falsely identify himself or herself in any way, to the law enforcement officer or any county jail personnel. Except as provided in subsection (2), any person who violates this subsection commits a misdemeanor of the first degree . . .

(2) A person who violates subsection (1), if such violation results in another person being adversely affected by the unlawful use of his or her name or other identification, commits a felony of the third degree . . .

Counsel argues that the crime of giving a false name to a law enforcement officer does not involve moral turpitude as conviction under the statute does not require proving fraudulent intent. As the applicant's theft convictions render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we will not address whether his conviction for giving a false name to a law enforcement officer involves moral turpitude.

The applicant was convicted of theft, which is a crime involving moral turpitude. The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is 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. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 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*, 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.

In rendering this decision, the AAO will consider all of the evidence in the record.

Counsel asserts that the applicant's mother will experience extreme emotional hardship if separated from the applicant because the applicant is dependent on her. Counsel states that the applicant has a mental illness and was homeless, and the applicant's mother and brother ensure the applicant takes medication and attends counseling. Counsel describes the applicant as now living with an aunt, walking to work, and visiting his mother. Counsel contends that the applicant's mother would be emotionally devastated if the applicant was deported to Colombia. Counsel argues that the applicant's mother cannot relocate to Colombia because she is married to a U.S. citizen, has another son in the United States, owns property and has a job, and pays a sizable amount of the applicant's medication and medical treatment. Counsel states that the applicant's mother left Colombia over 20 years ago due to the country's ongoing violence and instability.

The applicant's mother declared in the statement dated August 21, 2006 that the applicant lives with her sister and they are approximately a mile from her residence. The applicant's mother stated that she pays for the applicant's expenses and that her mental and emotional well-being is dependent on knowing that her son is okay. She stated that she visits the applicant daily, takes him to appointments, and gets his medicine. The applicant's mother stated that they have no extended family members in Colombia and her husband and younger son are in the United States.

The asserted hardship to the applicant's mother in the instant case is emotional in nature. The record contains evidence establishing that the applicant has a serious mental illness for which he was hospitalized and requires medication and psychiatric care. The Report of Medical Examination and Vaccination Record (Form I-693) dated September 30, 2008 stated that the applicant has a physical/mental disorder, with associated harmful behavior, Class A, and as of 2002 had no harmful behavior since his one episode and it is unlikely to recur. The letter from [REDACTED]

[REDACTED] dated December 8, 2008 stated that the applicant was diagnosed with schizoaffective disorder and has had no current associated harmful behavior and that the applicant is Class B, and not inadmissible under section 212(a)(1)(A)(iii) of the Act. The letter also stated that the psychiatrist recommended that the applicant have ongoing medication and psychiatric follow-up. The psychiatrist stated in his letter dated August 14, 2006 that the applicant has family support and his mental stability is dependent on this support. The letter from the psychiatrist dated September 22, 2008 states that the applicant works full-time as a server at a restaurant and lives with his aunt in an apartment owned by his mother. The psychiatrist stated that the applicant has been coming to the outpatient mental health service for four years and takes medication for schizoaffective disorder, and has not required re-hospitalization for his mental disorder. The evidence in the record shows that the applicant has a serious mental illness and that his mental stability is dependent on the supportive relationship that he has with his family members. In view of applicant's mother's assertion that she would be emotionally devastated if the applicant lived in Colombia and was without the support of family members, we acknowledge the record establishes the applicant's mother would experience extreme emotional hardship if she remained in the United States while her son relocated to Colombia alone.

In regard to joining the applicant to live in Colombia, counsel argues that the applicant's mother cannot relocate to Colombia because she is married to a U.S. citizen, has another son in the United States, owns property here, has a job, and pays for a sizable amount of the applicant's medication

and medical treatment. While it is claimed that the applicant's mother will have to give up her job in the United States, the submitted Country Brief on Colombia describes general economic conditions in Colombia in 2004 and is not sufficient to demonstrate that the applicant's mother will not be able to obtain a job in Colombia for which she is qualified to prevent her from suffering financial hardship and enable her to assist her son, if necessary, in paying for his medication and treatment. Furthermore, no evidence in the record shows that the applicant's mother will be forced to sell her real property in the United States at a substantial loss, or that she won't be able to use the proceeds or rent from the real property to facilitate her relocation to Colombia. While counsel asserts that the applicant's mother left Colombia over 20 years ago due to its violence and instability, no evidence has been presented that her life in Colombia would be in jeopardy. It is incumbent upon the applicant to substantiate claims of hardship. When the hardships actually demonstrated are considered together, they do not take the case beyond those hardships ordinarily associated with removal.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

As the applicant has not demonstrated that he is statutorily eligible for a waiver, we need not address whether he warrants a waiver as a matter of discretion.

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 not met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

**ORDER:** The appeal is dismissed.