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

U.S. Citizenship and Immigration Services

H2

DATE: JUL 1 0 2012 OFFICE: LOS ANGELES, CA

IN RE:

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:

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 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 with the field office or service center that originally decided your case by filing a 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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Honduras 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 a crime involving moral turpitude. The applicant is the son of a U.S. citizen, with two U.S. citizen children. He 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.

The Field Office Director found that the applicant had failed to establish that his inadmissibility would result in extreme hardship for his U.S. citizen spouse, his only qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated November 2, 2007.

On appeal, counsel asserts that Field Office Director considered the wrong relative in reaching his decision on extreme hardship and that the applicant's case should be remanded to the Field Office Director for adjudication as the AAO is "not to be an initial adjudicator of an I-601 in the first instance." *Attachment to the Form I-290B, Notice of Appeal or Motion*, dated November 26, 2007.

The record of evidence includes, but is not limited to: counsel's statement on appeal; a statement from the applicant's mother; medical documentation relating to the applicant's younger daughter; an online article on Ventriculomegaly; a 2006 employment verification from the applicant's employer; tax returns from 2000 to 2005; an unsigned and undated application from the applicant's spouse requesting that she be designated as the "payee" for the Supplemental Security Income Benefits paid to her younger daughter; and court records relating to the applicant's convictions. The entire record was reviewed and all relevant evidence considered in reaching 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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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 or "modified categorical" inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. 24 I&N Dec. 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. Finally, 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.

In the present case, the record reflects that, on March 9, 1988, the applicant pled guilty to Theft of Personal Property, California (Cal.) Penal Code § 484(a), his sentence was suspended and he was placed on probation for 24 months. On June 17, 1988, the applicant pled guilty to Burglary, First Degree, Cal. Penal Code § 459 and was sentenced to two years in prison and ordered to pay $100 in restitution. On June 6, 1989, the applicant was released on parole. On December 10, 1989, the applicant was arrested for theft and, thereafter, convicted of Petit Theft with Prior Conviction, Cal. Penal Code §§ 484(a) and 666, sentenced to 60 days in jail and placed on probation for 24 months. On March 11, 1998, the applicant was arrested and charged with perjury, and subsequently convicted of Perjury, Cal. Penal Code § 118, and Forging Official Seal, Cal. Penal Code, § 472, sentenced to 180 days in jail, which was suspended, and placed on probation for 36 months. On November 25, 1998, the applicant was again arrested for Forging Official Seal, Cal. Penal Code § 472, but the record does not provide a disposition for this arrest.

At the time of the applicant's 1988 and 1989 convictions for 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 Ninth Circuit Court of Appeals, addressed the issue of whether Cal. Penal Code § 484(a) constitutes a crime involving moral turpitude in *Castillo-Cruz v. Holder*, 581 F.3d 1154. The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a) and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently and is, therefore, a crime involving moral turpitude. In view of the holding in *Castillo-Cruz*, the AAO finds that the applicant's two theft offenses constitute crimes involving moral turpitude.

At the time of the applicant's 1988 burglary conviction, 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, as defined in Section 21 of the Harbors and Navigation Code, 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 are locked, aircraft as defined by Section 21012 of the Public Utilities Code or 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. A house, trailer, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

The record also indicates that the applicant was convicted of Burglary, First Degree, which Cal. Penal Code § 460 then identified as:

> 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.

In *Matter of Louissaint*, 24 I&N Dec. 721 (BIA 2009), the BIA found that entering or remaining in an occupied dwelling without permission to do so and with intent to commit any crime therein is a crime involving moral turpitude. The BIA noted that "the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently 'reprehensible conduct' committed 'with some form of scienter' . . . [because] it tears away the resident's justifiable expectation of privacy and personal security and invites a defensive response from the resident." *Id.* at 758-59 (quoting *Matter of Silva-Trevino*, 24 I&N at 706 & n.5). As the

applicant's conviction for Burglary, First Degree, establishes that he was convicted of burglary of an occupied dwelling, his burglary offense is also a crime involving moral turpitude.

At the time of the applicant's 1998 conviction for perjury, Cal. Penal Code § 118 stated:

> (a) Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury.

In *Matter of Martinez-Recinos*, 12 I&N Dec. 175, 178 (BIA 2001), the BIA in determining whether the respondent's conviction under Cal. Penal Code § 118(a) was a conviction for an aggravated felony also concluded that it was a crime involving moral turpitude. Therefore, the applicant's 1998 perjury conviction is a conviction for a crime involving moral turpitude.

At the time of the applicant's 1998 conviction for Forging Official Seal, Cal. Penal Code § 472 provided:

> FORGERY OR PUBLIC AND CORPORATE SEALS. Every person who, with intent to defraud another, forges or counterfeits the seal of this State, the seal of any public officer authorized by law, the seal of any Court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this State, or of any other State, Government, or country, or who falsely makes, forges or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery.

Crimes involving fraud or the intent to defraud constitute crimes involving moral turpitude. *Jordan v. De George*, 341 U.S. 223, 232 (1951); *see also Matter of Kolchani*, 24 I&N Dec. 128, 131 (BIA 2007); *Matter of Mclean*, 12 I. & N. Dec. 551, 552 (BIA 1967). Moreover, the Ninth Circuit Court of Appeals has long held that a violation of California Penal Code § 472 is a crime involving moral turpitude. *Winestock v. INS*, 576 F.2d 234, 235 (9th Cir. 1978)(citing *Lozano-Giron v. INS*, 506 F.2d 1073 (7th Cir. 1974), and *United States v. Wilkerson*, 469 F.2d 963 (5th Cir. 1972)). Accordingly, the applicant's forgery conviction pursuant to Cal. Penal Code § 472 is for a crime involving moral turpitude.

Based on our review of the applicant's criminal record, the AAO finds that he has been convicted of five crimes involving moral turpitude. Accordingly, his admission to the United States is barred pursuant to section 212(a)(2)(A)(i)(I) of the Act.

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

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
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> . . . .
>
> (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 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 or child of the applicant. Hardship to the applicant or other family members can be considered only to the extent that it results in hardship to a qualifying relative. The applicant's mother and children are the qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (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 BIA 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 BIA 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 BIA 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 BIA 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, the AAO considers the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

On appeal, counsel asserts that the Field Office Director incorrectly identified the applicant's spouse as a U.S. citizen and the applicant's only qualifying relative. Counsel states that the applicant's spouse holds only Temporary Protected Status in the United States and that the Field Office Director should have considered the hardship that the applicant's removal would create for his U.S. citizen mother. Counsel further contends that the present case should be returned to the Field Office Director as the AAO should not be the "initial adjudicator" of the waiver application.

The AAO acknowledges that the decision issued by the Field Office Director wrongly identified the applicant's spouse as his only qualifying relative. However, the AAO has jurisdiction over the waiver application and conducts an appellate review on a de novo basis,[1] and may appropriately consider whether the applicant in the present matter has established that a qualifying relative, i.e., his U.S. mother and/or his daughters, would experience extreme hardship if the waiver application is denied.

Counsel asserts that that the applicant's U.S. citizen mother suffers from depression and is dependent on him. He also states that the applicant has two U.S. citizen daughters, one of whom is blind and must be fed through a tube, and that the applicant's mother is unable to care for this "disabled and incompetent child." Counsel further contends that the applicant is the sole financial provider for the household.

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[1] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the all of the grounds for denial are not identified in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In November 15, 2006 and April 10, 2007 statements, the applicant's mother asserts that her dream is to have her son become a U.S. lawful permanent resident and that if he is removed from the United States, she will suffer emotionally. She states that she has been suffering from depression and that some days is saddened just thinking about what would happen if her son is not around to care for her younger granddaughter who suffers from Ventriculomegaly, and is blind and must be fed through a tube in her stomach. The applicant's mother contends that she feels sad, lonely and desperate because this child needs the applicant and that she does not believe that her heart can withstand the sadness of their separation. She also states that the applicant's spouse has diabetes and suffers from thyroid and liver conditions.

The applicant's mother further asserts that her son provides his family with financial support and that his removal would result in financial disaster. She also states that she believes that she would become ill as a result of being unable to support her sick granddaughter in the applicant's absence.

The record reflects that at the time of the appeal, the applicant was living at the same address as his mother and her husband. It further establishes that the applicant's younger daughter, born in 2005, has been diagnosed with a congenital brain malformation that has drastically affected her development and that she must be fed at times through a gastrostomy tube. The record does not, however, support counsel's assertions that the applicant's mother suffers from depression or is dependent on the applicant, that he is the sole provider for the household or that the burden of caring for her younger granddaughter would fall on her if the applicant is removed. Neither does it establish that the applicant's spouse suffers from any medical conditions.

The record contains no documentary evidence of the applicant's mother's mental state, the health problems of the applicant's spouse; or that the applicant is financially supporting his mother. The most recent documentation of the applicant's mother's financial status is a 2003 tax return filed jointly with her husband, which is insufficient to establish her income at the time the appeal was filed in 2007. Further, the record does not document her financial obligations or that they were being covered by the applicant at the time of the appeal. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the AAO does not find the record to establish that the applicant's mother would experience hardships beyond those normally created by separation as a result of removal or exclusion.

We do, however, take note of the applicant's mother's claim that her younger granddaughter needs the applicant and would experience hardship if they were separated. The record contains medical records that establish the extent to which the applicant's younger daughter's development and health have been affected by a brain malformation and other medical problems, and her need for continuing, frequent medical monitoring and care. It further indicates that, at the time of the appeal, the applicant and his spouse were paying for some of their younger daughter's medical costs out of pocket. The record also demonstrates that the applicant's spouse does not have a permanent lawful status in the United States, but is residing here in Temporary Protected Status. In light of the

devastating nature of the applicant's younger daughter's medical condition, her total dependence on her parents, and the fact that her mother's ability to reside with her in the United State is temporary, the AAO finds that the applicant's younger daughter would experience uncommon hardship if the waiver application is denied and she remains in the United States.

We note, however, that the applicant has not asserted that his mother and/or daughters would experience any hardship if they relocate with him to Honduras and that, without such assertions, we may not speculate as to what hardships they would face. Therefore, the AAO must find that the applicant has not established that relocation would result in extreme hardship for his mother and/or children.

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, the AAO cannot find that refusal of admission would result in extreme hardship to the qualifying relative(s) in this case.

The record does not demonstrate that a qualifying relative would suffer extreme hardship and the applicant has, therefore, failed to establish eligibility for a waiver under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, we will not discuss whether he merits 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 establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.