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



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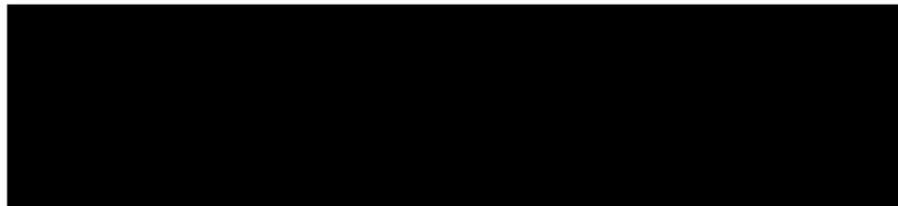
Office: LOS ANGELES, CA

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:

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,

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 Bolivia who was found to be inadmissible under 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, 8 U.S.C. § 1182(h). 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.

On appeal, counsel disputes the director's finding that the applicant's burglary conviction in violation of Cal. Penal Code § 459 and his disorderly conduct involving prostitution conviction under Cal. Penal Code § 647(b) constitute crimes involving moral turpitude. Counsel contends that even if one of the convictions is a crime involving moral turpitude, it falls within the petty offense exception. Counsel cites *Matter of Oscar Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 553 (BIA 2008), to establish that the applicant's disorderly conviction did not constitute a crime involving moral turpitude. Additionally, counsel cites *Matter of M*, 2 I. & N. Dec. 721, 723 (BIA 1946), and states that pushing ajar the unlocked door of an unused structure and putting one's foot across the threshold would constitute a breaking and entering, but is not in and of itself "base, vile, or depraved." Moreover, counsel cites *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir.2005), and states that the Ninth Circuit Court of Appeals found that the Washington burglary statute encompassed conduct that fell outside the definition of a crime involving moral turpitude since the intent to commit any felony satisfied the mens rea. Finally, counsel maintains that the applicant demonstrated extreme hardship to a qualifying relative. Counsel states that the director failed to consider all relevant factors, and erred in not treating the applicant's U.S. citizen as a qualifying relative.

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 (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 record reflects that on May 17, 1995 the applicant was convicted of burglary in violation of Cal. Penal Code § 459. The judge suspended imposition of a sentence and placed the applicant on summary probation for 24 months. On October, 5, 1999, the applicant was arrested for disorderly conduct involving prostitution in violation of Cal. Penal Code § 647(b). On January 12, 2001, the applicant was convicted of that charge. The judge suspended imposition of a sentence and placed the applicant on summary probation for 12 months and ordered that he serve 14 days in jail.

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir.2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero, supra* at 999. In *Nicanor-Romero*, the Ninth Circuit states that in making this determination there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude. *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Id.* at 1004-05. *See also Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (whether an offense categorically involves moral turpitude requires reviewing the criminal statute to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct that is not morally turpitudinous).

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." *Matter of Silva Trevino*, 24 I&N Dec. 687, 697 (A.G. 2008) (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. 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.

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.

With regards to following *Silva-Trevino* in the Ninth Circuit, the Board stated recently “Since the Ninth Circuit . . . has not rejected *Silva-Trevino*, we will follow the approach set forth in the Attorney General's opinion.” *Matter of Guevara Alfaro*, 25 I&N Dec. 417, 423 (BIA 2011).

The applicant was convicted of burglary in violation of Cal. Penal Code § 459, which provides that:

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, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety 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, vessel designed for habitation, 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.

Essentially, a conviction under Cal. Penal Code § 459 requires proof of three essential elements: (1) entry, (2) any building, certain vehicles and vessels, or other listed structures and containers, and (3) the intent to commit larceny or any felony. *See People v. Davis*, 18 Cal.4th 712, 76 Cal.Rptr.2d 770, 958 P.2d 1083, 1085 (1998).

Counsel contends that not all of the proscribed conduct under Cal. Penal Code § 459 involves moral turpitude. Counsel, citing *Matter of M*, 2 I&N Dec. 721, 723 (BIA 1946), states that the Board indicated that pushing ajar the unlocked door of an unused structure and putting one's foot across the threshold would constitute a breaking and entering, but is not in and of itself “base, vile, or depraved.” Also, counsel cites *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1019 (9th Cir.2005), and states that the Ninth Circuit Court of Appeals found that because an intent to commit *any* crime satisfied the definition of burglary under Washington Revised Code § 9A.52.025(1), the offense encompassed conduct that falls outside the definition of a crime of moral turpitude. Counsel states that since proof of an intent to commit *any felony* satisfies the statutory element of Cal. Penal Code § 459, that it would necessarily encompass conduct outside the definition of a crime involving moral turpitude since not all felonies are crimes involving moral turpitude.

We find that in *Matter of M*, the Board, in essence, held that an offense involving breaking and entering or trespass may be deemed to involve moral turpitude only if accompanied by the intent to commit a morally turpitudinous act after entry. 2 I&N Dec. at 723-724. In *Cuevas-Gaspar*, the Ninth Circuit addressed inadmissibility under section 237(a)(2)(A)(i) of the Act, and whether conviction under Washington Revised Code § 9A.52.025(1) for residential burglary was a crime involving moral turpitude. A person is guilty of residential burglary under Wash. Rev. Code Ann. §

9A.52.025(1) if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

In the instant case, we are addressing violation of Cal. Penal Code § 459 and inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Furthermore, *Cuevas-Gaspar* was decided prior to the modification of the categorical inquiry in *Duenas-Alvarez* and *Silva-Trevino*. We must therefore make a determination of whether there is “a realistic probability, not a theoretical possibility,” that Cal. Penal Code § 459 would be applied to reach conduct that did not involve moral turpitude. 523 F.3d at 1004. The act of entering with the intent to commit larceny is a crime involving moral turpitude. *See Rashtabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir.1994) (holding that grand theft is a crime involving moral turpitude); and *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir.1999) (petty theft constitutes a crime of moral turpitude). Even if we accept counsel’s argument that Cal. Penal Code § 459 is not a categorical crime involving moral turpitude because it may apply to felonies committed after breaking and entering that are not morally turpitudinous, there is no doubt that Cal. Penal Code § 459 also applies to conduct involving moral turpitude, and we then must, under the framework outlined in *Matter of Silva-Trevino*, proceed to a second and, if necessary, third stage of inquiry to determine if the applicant was convicted for a crime involving moral turpitude. 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. It is not clear that the applicant has submitted the entire available record of conviction, or any other relevant evidence to resolve the moral turpitude question in his favor. Consequently, we will not disturb the finding that the applicant’s conviction under Cal. Penal Code § 459 is crime involving moral turpitude. Accordingly, we find that the conviction under Cal. Penal Code § 459 constitutes a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was convicted under Cal. Penal Code § 647(b), which provides that:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

. . .

(b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, “prostitution” includes any lewd act between persons for money or other consideration.

Counsel cites *Matter of Oscar Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 553 (BIA 2008), to establish that the applicant’s disorderly conduct involving prostitution conviction did not constitute a crime involving moral turpitude. Counsel states that the Board found that violation of Cal. Penal Code §

647(b) does not render an alien inadmissible under section 212(a)(2)(D)(ii) of the Act as the full range of conduct proscribed under section 647(b) of the California Penal Code, such as solicitation of prostitution on one's own behalf, is broader than conduct proscribed under section 212(a)(2)(D)(ii) of the Act. Counsel also stated that the Board held that the offense does not constitute a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act.

However, we must reject counsel's contention as the Ninth Circuit Court of Appeals has more recently determined that violation of Cal. Penal Code § 647(b) is a crime involving moral turpitude. *Rohit v. Holder*, No. 10-70091 (9th Cir. Feb. 29, 2012). Accordingly, we find that the applicant's conviction under Cal. Penal Code § 647(b) for disorderly conduct involving prostitution constitutes a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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 claims that the applicant's wife and daughter will experience emotional hardship due to separation from the applicant, and we find this claim is in accordance with the declarations by the applicant and his wife and daughter, as well as with the psychological evaluation from Dr. [REDACTED] dated July 8, 2009. The applicant stated in his declaration dated July 17, 2009 that he would earn about \$100 in Bolivia compared to the \$380,000 that his construction contracting business earned last year. He stated that his wife would feel strange in Bolivia because she is different from her native country of Mexico. The applicant indicated that he has been together with his wife for 21 years and has been married to her for eight years. He conveyed that they have one

daughter together, [REDACTED] who was born on June 15, 1988, and is now attending college. Dr. [REDACTED] stated that the applicant's wife has depression due to anxiety about her daughter, [REDACTED] future. Dr. [REDACTED] conveyed that the applicant's daughter is divorced and has been raising her child (born on February 16 2007) without any financial support from the biological father. Dr. [REDACTED] indicated that the applicant's daughter is emotionally and financially dependent on the applicant, working part time at the applicant's business. The applicant's wife stated to Dr. [REDACTED] that she does not have the business acumen to manage her husband's company, and that she works as a certified nursing assistant earning \$1,200 every two weeks, which the applicant's wife stated is not enough to support the family as they have a mortgage of \$1,300 per month and car payments, and would not be able to afford childcare. The applicant's wife was diagnosed with mood disorder and his daughter with anxiety disorder and dependent personality disorder. The applicant's wife stated that they are both distraught about the applicant's immigration problems. Lastly, the record also contains declarations by the applicant's parents in which they describe the assistance they receive from the applicant in taking them to medical appointments.

In regard to the hardships of relocation with the applicant to Bolivia, the applicant indicates that his wife will have difficulty adjusting to life in Bolivia and leaving family, especially [REDACTED] in the United States. The applicant stated that his wife has lived in the United States for 44 years and cannot live in Bolivia or separate from her family (parents and daughters) in the United States. The applicant stated in his declaration dated July 17, 2009 that he would earn about \$100 in Bolivia compared to the \$380,000 that his construction contracting business earned last year. The applicant has not provided any documentation in support of the financial, cultural, and social hardships that his wife will experience in Bolivia. Thus, less weight will be given to these factors in the hardship determination. While we acknowledge that the applicant's wife will experience emotional hardship in separating from [REDACTED] who is now a 23-years-old mother, and taking accounting classes to augment her bookkeeping knowledge, her emotional hardship has not been shown to be more than the common or typical results of removal and inadmissibility.

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.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing 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 proving eligibility 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.