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

[redacted]

H2

DATE: NOV 0 6 2012 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Vermont Service Center, and are now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of India and a citizen of Pakistan who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude; section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien seeking admission within 10 years of departure or removal following a removal order; and section 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II), as an alien seeking admission within 10 years of departure or removal after having been unlawfully present in the United States for one year or more. The applicant is the spouse of a U.S. citizen. She seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), as well as waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(h) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h), in conjunction with an immigrant visa application, in order to obtain admission to the United States as a lawful permanent resident.

The director found that the applicant had failed to establish that the bar to her admission would result in extreme hardship to the qualifying relative, as required for waivers under sections 212(a)(9)(B)(v) and 212(h) of the Act, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Director's Decision*, dated February 18, 2010. In a separate decision, issued on February 18, 2010, the director also denied the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal, finding that a favorable exercise of discretion was not warranted after weighing the favorable and unfavorable factors in the applicant's case.

In her Form I-290B, Notice of Appeal or Motion, dated March 16, 2010, the applicant appeals the decision of the director, denying the Form I-601. In the attached statement, dated March 16, 2010, she also appeals and requests reconsideration of the denial of her Form I-212. We note that the Form I-212 and Form I-601 are separate applications, and the director addressed each in a separate decision. The applicant is required to file a separate appeal with filing fee for each decision appealed. In situations where an applicant must file a Form I-212 and a Form I-601, the adjudicator's field manual clearly states that the Form I-601 is to be adjudicated first. Chapter 43.2(d) of the Adjudicator's Field Manual states, "If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212 since its approval would serve no purpose." Thus, based on this rule, in a situation like the applicant's, where there is one appeal that has been filed and either the Form I-212 or the Form I-601 could be considered on appeal, the AAO will review the decision denying the Form I-601.

The record of evidence includes, but is not limited to, the applicant's multiple statements; medical records of the applicant's citizen spouse; the applicant's Pakistani passport and Canadian permanent residency card; and various documents in the record regarding the bona fides of the applicant's current marriage, including statements of the applicant's spouse and children. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9) of the Act provides, in pertinent parts:

(A) CERTAIN ALIENS PREVIOUSLY REMOVED

(i) Arriving Aliens

Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other Aliens

Any Alien not described in clause (i) who –

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such aliens' departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii)Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous terroritory, the Attorney General has consented to the alien's reapplying for admission.

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is

deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions.-

. . .

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

. . .

(iv) Tolling for good cause.-In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

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 –

(1) . . .

(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 . . . .

The record reflects that applicant was initially admitted to the United States as a visitor. On or about October 17, 1994, her first husband filed a Form I-589, Application for Asylum and Withholding of Removal, on which the applicant was a derivative applicant. The Asylum Office referred the application to the Immigration Court on August 30, 1995, and an Order to Show Cause was issued, placing the applicant, her former husband, and their minor children into deportation proceedings under former section 242 of the Act.[1] On May 10, 1999, the Immigration Judge denied the applicant's former husband's Form I-589 and granted the applicant and her former husband voluntary departure. The applicant's former spouse filed a timely appeal to the Board of Immigration Appeals (Board), which summarily affirmed the Immigration Judge's decision on December 20, 2002.

During the pendency of her deportation proceedings, the applicant was convicted on September 2, 1998 of Retail Fraud in the Second Degree in violation of section 750.356d of the Michigan Compiled Laws Annotated (M.C.L.) and Contributing to Neglect or Delinquency of Children in

[1] Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, 587-89 (1996) consolidated the previously distinct exclusion and deportation proceedings before the Immigration Court into a single removal proceeding under section 240 of the Act, 8 U.S.C. § 1229a.

violation of M.C.L. § 750.145. She was sentenced to six months of probation, 40 hours of community service, and was ordered to pay $100 fine on each charge.

The record indicates that on July 9, 2003, the Board granted the applicant's motion to reopen, which was based on the filing of a Form I-130 Petition for Alien relative filed on her behalf by her second and current husband, who is a U.S. citizen. On November 19, 2003, the Immigration Judge ordered the applicant removed, after the Form I-130 visa petition had already been denied. On September 28, 2005, the Board affirmed the decision of the Immigration Judge in part, but remanded the matter to allow the applicant to seek voluntary departure in lieu of a removal order. On November 23, 2005, the applicant was granted voluntary departure. On December 21, 2005, the applicant departed the United States and went to Canada, where the record indicates she has permanent resident status. The applicant now seeks to immigrate to the United States based on a new approved Form I-130 petition by her citizen husband.

As an initial matter, the AAO finds that the record does not support the director's finding of the applicant's inadmissibility pursuant to section 212(a)(9)(A)(ii) of the Act, as an alien seeking admission within 10 years of his or her removal or departure from the United States while a removal order was outstanding. The director erred in finding that the applicant had departed the United States on December 21, 2005 while a removal order, entered on November 19, 2003, was outstanding. The record indicates that following the November 19, 2003 removal order, the Board on appeal remanded the matter back to the Immigration Judge, who, on November 23, 2005, granted the applicant voluntary departure until December 23, 2005. According to a Canadian refugee record in the file, the applicant complied with the terms of the immigration court's order by departing the United State on December 21, 2005, prior to the end of the voluntary departure period.. As there was no outstanding removal order in place at the time of the applicant's departure from the United States on December 21, 2005, the ground of inadmissibility under section 212(a)(9)(A)(ii) is not triggered. It was therefore unnecessary for the applicant to file the Form I-212.

As the applicant has not disputed inadmissibility under section 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II), as an alien seeking admission within 10 years of departure or removal after having been unlawfully present in the United States for one year or more,[2] and the record does not show that finding of inadmissibility to be in error, the AAO will not disturb the determination. The director also found the applicant inadmissible for having been convicted of a crime involving moral turpitude pursuant to section 212(a)(2)(A)(i)(I), based on her conviction for Retail Fraud in the Second Degree.

The Board, in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), held that:

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[2] We note, however, that the director's calculation of the unlawful presence period of one year or more from December 2002 to December 20, 2005, for purposes of the applicant's inadmissibility under section 212(a)(9)(B)(i)(II), appears to be in error. The record indicates that, between March 2003 and August 2003, the applicant had a pending adjustment of status application, which would toll unlawful presence. It further shows that the applicant departed the country in approximately August 2003 and was paroled back into the United States in September 30, 2003 until December 29, 2003. Although she started accumulating unlawful presence after December 29, 2003, the periods of unlawful presence from two different periods of stay in the United States cannot be calculated in the aggregate. However, we observe that the applicant appears to have accumulated the requisite one year of unlawful presence, beginning on December 30, 2003 and her voluntary departure on December 21, 2005.

> [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 the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." *Silva-Trevino*, 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Silva-Trevino*, 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. *Id.* 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.' The sole purpose of the inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703 (citation omitted).

At the time of the applicant's arrest and conviction in 1998, the criminal statute for Retail Fraud in the Second Degree under M.C.L. § 750.356d provided that:

> (1) A person who does any of the following in a store or in its immediate vicinity

is guilty of retail fraud in the second degree, a misdemeanor punishable by imprisonment for not more than 93 days, or a fine of not more than $100.00, or both:

(a) While a store is open to the public, alters, transfers, removes and replaces, conceals, or otherwise misrepresents the price at which property is offered for sale, with the intent not to pay for the property or to pay less than the price at which the property is offered for sale.

(b) While a store is open to the public, steals property of the store that is offered for sale.

(c) With intent to defraud, obtains or attempts to obtain money or property from the store as a refund or exchange for property that was not paid for and belongs to the store.

(2) A person who commits the crime of retail fraud in the second degree shall not be prosecuted under the felony provision of section 356, or under section 218 or 360.

The Board has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). The AAO notes that the statute under which the applicant was convicted does not distinguish between whether the taking was permanent or temporary. However, the Board in *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), 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* is applicable in this case.

Based solely on the criminal statute, the AAO finds that the applicant's crime was retail theft. Pursuant to the reasoning in *Jurado*, she was therefore convicted of knowingly taking goods of another with the intent to permanently deprive that person of such goods. Thus, the AAO finds that the applicant's conviction for Retail Fraud in the Second Degree under M.C.L. § 750.356d constitutes a crime involving moral turpitude.

However, we note that the applicant's retail fraud conviction falls within the petty offense exception to a crime involving moral turpitude set forth in section 212(a)(2)(A)(ii)(II), because the maximum penalty possible for the conviction is less than one year and the applicant was not sentenced to a term in excess of six months for the conviction. M.C.L. § 750.356d(1). This conviction, therefore, does not by itself render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act as a crime involving moral turpitude.

The applicant, however, may still be inadmissible under section 212(a)(2)(A)(i)(I) if she has more than one conviction that qualifies as a crime involving moral turpitude. The record indicates that, along with the retail fraud conviction, the applicant was also convicted of Contributing to Delinquency of Children in violation of the M.C.L. § 750.145 on September 2, 1998.

Section 750.145 of the Michigan Compiled Laws provides:

> CONTRIBUTING TO NEGLECT OR DELINQUENCY OF CHILDREN—Any person who shall by any act, or by any word, encourage, contribute toward, cause or tend to cause any minor child under the age of 17 years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court[3], as defined in section 2 of chapter 12a of Act No. 288 of the Public Acts of 1939, as added by Act No. 54 of the Public Acts of the First Extra Session of 1944, [M.C.L. § 712A.2] and any amendments thereto, whether or not such child shall in fact be adjudicated a ward of the probate court, shall be guilty of a misdemeanor.

Pursuant to M.C.L. § 712A.2(a), a juvenile comes under the jurisdiction of the Family Division of Circuit Court for several reasons, including for having violated any municipal ordinance or law of the state or of the United States or because the juvenile has been abandoned by his parents or guardian.

We observe that the certified disposition in the record specifies that the applicant's conviction involved contributing to the delinquency of a minor, not neglect of a minor. We also note that the statutory language above indicates a person can, "by any act, or by any word, encourage, contribute toward, cause or tend to cause" a child under the age of 17 years to come within the jurisdiction of the Family Division of Circuit Court by causing him to commit a crime, and thereby become delinquent. The criminal statute at issue does not set forth the specific conduct that contributes to a minor child becoming delinquent. We also note that a conviction under M.C.L. § 750.145 does not require a mens rea or any specific intent as an element of the crime. The "mere doing of any act which encourages, causes, or contributes" to the delinquency of a child constitutes a violation of the statute, but in the absence of a vicious motive or corrupt mind, the crime does not involve moral turpitude. *Matter of P-*, 2 I&N Dec. 117, 121 (BIA 1944) (finding that a Washington State conviction for contributing to delinquency minors does not involve moral turpitude where neither the statute nor the underlying record of conviction disclosed an evil intent). Thus, there is a reasonable probability that a conviction under this section could involve conduct that does not involve moral turpitude. *Silva-Trevino*, 24 I&N Dec. at 698.

As we have concluded that the criminal statute is inconclusive as to whether a conviction under it involves turpitudinous conduct, it is appropriate to look to the underlying record of conviction to resolve the issue. *Silva-Trevino*, 24 I&N Dec. at 698-699, 703-704, 708. However, aside from a court disposition of her conviction, the applicant has not provided any other documents from the record of conviction, namely, the charging document (indictment, information, or complaint), jury instructions, a signed guilty plea, or the plea transcript from her criminal case. The record does contain documents outside of the conviction record, including the incident/arrest report, store report of apprehension, a district court arrest warrant for the applicant, and a police narrative report. The store report of apprehension states that the applicant and another individual stole several items from a store together. We note that the name and identity of the second offender is redacted as it is a

[3] Beginning January 1, 1998, juvenile delinquency cases in Michigan are now prosecuted in Family Division of Circuit Court. *See* M.C.L. § 600.1021(1)(e).

minor, as indicated on the police department cover letter for the arrest and store reports. The arrest warrant also sets forth the counts with which the applicant was charged, including the charge of Contributing to Delinquency of Children for which she was ultimately convicted. It indicates that the applicant contributed to the delinquency of a minor child by committing felony Retail Fraud with the minor.

Based on our analysis set forth above, the underlying crime in which the applicant engaged with the minor, namely, retail fraud, has a specific intent and is a crime involving moral turpitude. Thus, the applicant contributed to the delinquency of a minor by causing the minor commit a crime that would constitute a crime involving moral turpitude. We find that such conduct is likewise inherently base, vile, and depraved. Furthermore, the record shows that the applicant engaged in retail fraud *with* the child, which indicates knowledge and intent to have the minor engage in the criminal conduct. Based on this evidence and the lack of any contradicting evidence, we find that the applicant's conviction for Contributing to Delinquency of Children constitutes a crime involving moral turpitude.

As the applicant has been convicted of more than one crime involving moral turpitude, the petty offense exception does not apply and the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Accordingly, the applicant requires waiver under sections 212(h) and 212(a)(9)(B)(v) of the Act to overcome her inadmissibility under section 212(a)(2)(A)(i)(I) and 212(a)(9)(B)(i)(II) of the Act, respectively.

Sections 212(a)(9)(B)(v) and 212(h) of the Act both provide that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 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 of Immigration Appeals (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 v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (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.

The applicant contends that her citizen husband would suffer extreme hardship upon relocation to Canada, based on financial hardship and separation from family members in the United States. She asserts that her husband owns a store in Michigan and has also been employed with the same company, [redacted], for over sixteen years as a Tool and Die Maker. The applicant states that because it would be more difficult for her husband run his business from Canada and due to his long term employment in the United States, it would not be practical or logical for him to move to Canada. She states that because of his obligations in the United States, he is only able to visit her for approximately three days at a time in Canada. The applicant also states that her husband grew up in California and Michigan and has lived most of his life in the United States, where most of his family members live as well. Joint tax returns in the record indicate that the applicant's spouse also has children from a prior marriage, though their ages are not indicated.

Based on the evidence of record, the AAO finds that the applicant has not demonstrated that the hardship factors her husband would face upon relocation to Canada rise to the level of extreme hardship. We recognize that relocating may very well cause her spouse emotional distress as a result of separation from his other family members in the United States. However, other than the applicant's statement, the record contains very little evidence in support of her claim of hardship to

her spouse. Notably absent is a statement of the applicant's husband, addressing the hardships he would face if he moved to Canada. The record also lacks statements from the applicant's husband's children or other family members in the United States and any other evidence demonstrating the citizen's spouse's close ties in the United States, such that relocation would cause him extreme hardship. The applicant's assertions alone are insufficient in demonstrating hardship to her husband. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

The AAO further notes that while relocation may entail some financial detriment to the applicant's citizen spouse, there is no evidence in the record to show that it would cause the spouse financial hardship. The applicant claims only that her husband's relocation to Canada would not be practical or logical based on his business and employment in the United States. However, she does not articulate, nor does the record disclose, any reason why this would rise to the level of hardship, let alone extreme hardship. There is nothing in the record to suggest that the applicant's husband could not obtain new employment or start a new business in Canada. Alternatively, there is no contention that the applicant is unemployed in Canada or is otherwise financially unable to support her husband, at least initially, upon relocation.

The applicant also asserts that her citizen spouse would suffer extreme hardship upon separation from each other. She claims that the physical distance places a strain on their marital relationship and that her husband is suffering from a medical condition for which he requires her care and treatment. In her December 8, 2009 statement, the applicant states that her husband was recently diagnosed with Complex Regional Pain Syndrome (CRPS) and has submitted medication prescription labels and hospital records of the applicant's husband's visits to the emergency room for pain. We note that the applicant has not provided a letter from her husband's treating physician, setting forth the actual diagnosis and prognosis for his condition. We also observe again the lack of a statement from the applicant's husband, setting forth the impact of his medical condition on his day to day life and the hardship resulting from not having his wife in the United States to assist him in his care. Additionally, the record also indicates that her husband has many family members in the United States who may assist him. While the applicant asserts in summary fashion that her husband's family members in the United States are too busy to help him all the time, there is no evidence in the record to support this assertion.

We note further the applicant and her spouse have not resided together since December 2005. Although the applicant indicates that her husband has travelled to visit her in Canada, there is no evidence of these visits in the record. Moreover, given our finding that the applicant had not shown that her spouse would suffer extreme hardship in relocating to Canada, it is significant that she and her husband have voluntarily resided separately from each other rather than together as a family unit in Canada. *See Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due in part to the voluntary separation of applicant and spouse are 28 years)

Having considered the evidence of record, the AAO finds that it does not demonstrate that the applicant's citizen spouse would experience extreme hardship as a result of separation from the applicant. The applicant has not shown the hardship her husband would suffer constitutes

"significant hardship over and above the normal disruption of social and community ties" normally associated with deportation or refusal of admission. *Matter of O-J-O-*, 21 I&N Dec. at 385.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relatives, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to her citizen spouse as required under sections 212(h) and 212(a)(9)(B)(v) of the Act. She, therefore, remains inadmissible to the United States under sections 212(a)(2)(A)(i)(I) and (a)(9)(B)(i)(II) of the Act. Since the applicant failed to establish statutory eligibility for the waivers under sections 212(h) and 212(a)(9)(B)(v) of the Act, the AAO finds that no purpose would be served in considering whether the applicant merits the waivers in the exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(A)(iii), 212(a)(9)(B)(v), and 212h(h) of the Act, the burden of proving eligibility remains entirely with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has met her burden to show that she is not inadmissible under section 212(a)(9)(A)(ii) of the Act. However, the applicant has not met her burden to establish eligibility for a waiver under sections 212(a)(9)(B)(v) and 212(h) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.