

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]

H<sub>2</sub>

DATE: **OCT 10 2012**

Office: NEWARK, NJ

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the  
*Immigration and Nationality Act, 8 U.S.C. § 1182(h)*

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Newark, New Jersey, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen or reconsider. The motion will be granted. The underlying application will remain denied.

The applicant is a native and citizen of Colombia 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 married to a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would result in extreme hardship for his spouse and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated November 26, 2007. On appeal, the AAO also found that the record did not contain sufficient evidence to demonstrate that the applicant's spouse would experience extreme hardship whether she relocated to Colombia or remained in the United States without the applicant. *AAO Chief's Decision*, dated July 13, 2010.

On motion, counsel asserts that the AAO erred in analyzing the applicant's conviction for Grand Larceny, New York Penal Law (NYPL) § 155.40, under the analytical framework established by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). Counsel contends that the *Third Circuit Court of Appeals*, the jurisdiction within which this case arises, has rejected *Silva-Trevino* and that the AAO must reconsider the applicant's conviction pursuant to *Jean-Louis v. Holder*, 582 F.3d 462 (3<sup>rd</sup> Cir. 2009). Counsel also submits additional documentary evidence in support of the hardship claim and provides statements in support of the applicant's character and rehabilitation.

The record includes, but is not limited to, statements from the applicant's spouse and mother-in-law; a Security Agreement, signed by the applicant; mortgage documents; letters of support from friends of the applicant; an auto insurance identification card; and evidence previously submitted with the applicant's Form I-601 and his appeal. The entire record was reviewed and all relevant information considered in reaching a decision on the motion.

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).

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.)

Counsel has correctly pointed out that the applicant's case falls within the jurisdiction of the Third Circuit Court of Appeals, which in *Jean-Louis v. Holder*, rejected the "realistic probability approach" articulated by the Attorney General in *Silva-Trevino*. Instead, the Third Circuit has affirmed the traditional categorical approach to determine whether an offense constitutes a crime involving moral turpitude. See *Jean-Louis* at 473-82. The categorical inquiry in the Third Circuit consists of looking "to the elements of the statutory offense . . . to ascertain that least culpable conduct necessary to sustain a conviction under the statute." *Id.* at 465-66. The "inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute 'fits' within the requirements of a CIMT." *Id.* at 470. However, if the "statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted." *Id.* at 466. This is true even where clear sectional divisions do not delineate the statutory variations. *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.* Accordingly, the AAO will consider the nature of the applicant's grand larceny offense under the analytical framework outlined by the Third Circuit in *Jean-Louis*.

The record reflects that the applicant was convicted on August 1, 2002 of grand larceny in the second degree in violation of NYPL § 155.40, a Class C felony, punishable by a maximum of fifteen years imprisonment. The applicant was sentenced to six months imprisonment.

At the time of the applicant's conviction, NYPL § 155.40 provided, in pertinent part:

A person is guilty of grand larceny in the second degree when he steals property and when:

1. The value of the property exceeds fifty thousand dollars; or
2. The property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will (a) cause physical injury to some person in the future, or (b) cause damage to property, or (c) use or abuse his position as a public servant by engaging in conduct within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely.

The Board of Immigration Appeals has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). Although NYPL § 155.40 does not state that the theft it punishes is of a permanent nature, NYPL § 155.05 defines larceny as occurring:

When, with the intent to deprive another of property or to appropriate the same to himself or to a third person, [a person] wrongfully takes, obtains or withholds such property from an owner thereof."

Deprive is defined in paragraph 3 of NYPL § 155.00:

To 'deprive' another of property means (a) to withhold property or cause it to be withheld from another permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to the owner, or (b) to dispose of the property in such a manner or under such circumstances as to render it unlikely that an owner will recover such property.

Appropriate is defined in paragraph 4 of NYPL § 155.00:

To 'appropriate' property of another to oneself or a third person means (a) to exercise control over it, or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself or a third person.

New York courts have found that larcenous intent is shown when a defendant intends to exercise control over another's property for so an extended period or under such circumstances as to acquire the major portion of its economic value or benefit. See *People v. Jennings*, 69 N.Y.2d 103, 118-122, 504 N.E.2d 1079, 1086-89 (N.Y. 1986). They have also held that a larceny conviction requires the intent to permanently deprive the owner of his property and that a temporary withholding of property, by itself, does not constitute larcenous intent. See *People v. Hoyt*, 92 A.D.2d 1079, 461 N.Y.S.2d 569, 570 (N.Y. App. Div. 3<sup>rd</sup> Dept. 1983); see also *Ponnapula v. Spitzer*, 297 F.3d 172, 183-84 (2<sup>nd</sup> Cir. 2002)(observing that while the intent to temporary deprive an owner of property does not constitute larcenous intent, such a temporary deprivation occurs only where a person borrows property without permission with the intent to return the property in full to the owner after a short and discrete period of time). We do not interpret *Matter of Grazley* to create more than a narrow exception to the general and longstanding rule that larceny or theft is a crime involving moral turpitude. We do not perceive any significant difference in the state of mind between an individual who takes property with intent to never return or relinquish it, and the person who takes it without that intent but with the intent to acquire the major portion of its value or to dispose of it (and, presumably, acquire its value). We find it more likely that the Board intended a formulation of temporary much as defined in *Pannapula* – the borrowing of property without permission with the intent to retain it for a short and discrete period of time.

Thus, pursuant to the reasoning in *Jean-Louis*, the AAO concludes that the least culpable conduct punished by NYPL § 154.40 involves the permanent taking of another person's property. Accordingly, the applicant's grand larceny offense is categorically a crime involving moral turpitude.

Having found the applicant inadmissible pursuant to section 212(a)(2)(i)(I) of the Act, the AAO turns to a consideration of whether the additional evidence submitted by counsel, when aggregated with that already provided, establishes that the applicant is eligible for a waiver under section 212(h) of the Act, which states 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 –

. . . .

(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)(1)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, the U.S. citizen or lawfully resident spouse, parent or child of an applicant. The qualifying relative in this proceeding is the applicant's spouse.<sup>1</sup> Accordingly, hardship to the applicant or other family members will be

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<sup>1</sup> The AAO notes that a Form G-325A, Biographic Information, completed by the applicant indicates that his mother lives in New Jersey. However, no documentary evidence establishes that the applicant's mother is a qualifying relative for the purposes of this proceeding, i.e., a U.S. citizen or Lawful Permanent Resident, and no claim is made that she

considered only insofar as it results in hardship to the applicant's spouse. 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-Morales*, 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

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would suffer hardship as a result of the applicant's inadmissibility. Accordingly, hardship to the applicant's mother has not been considered.

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.

On motion, counsel asserts that the applicant has a bona fide and loving relationship with his U.S. citizen spouse and is the primary source of income for his family. He further states that since the filing of the appeal, the applicant and his spouse have purchased a home. Counsel contends that the applicant's spouse would, therefore, suffer extreme and unusual hardship if the waiver application is denied.

In an undated statement submitted in support of the motion, the applicant's spouse reports that she and the applicant have a business and have just purchased a home. She states that the applicant is her "right hand" and that she does not know what she would do without him. Previously, in a March 3, 1006 statement, the applicant's spouse indicated that she was seeking to continue her education and was relying on the applicant for support. She further asserted that, without him, she feared she would not be able to succeed or maintain her standard of living.

In addition to the applicant's spouse's statement, the motion is supported by a July 28, 2010 statement from the applicant's spouse's mother. In her affidavit, the applicant's spouse's mother maintains that her daughter is suffering from depression as a result of her uncertain future with the applicant.

In support of the preceding claims, the applicant has submitted documentation that establishes he and his spouse purchased a home in 2010 and are responsible for a monthly mortgage payment of \$1,681.76 and an annual home insurance premium of \$884. The AAO also finds the record to contain a Security Agreement between the applicant and [REDACTED] indicating that the applicant borrowed \$80,000 in 2006 to start a business. The record also includes tax records, including W-2 Wage and Tax Statements, for the applicant's spouse covering the years 2002 through 2005, and two 2006 earnings statements for the applicant.

While the AAO acknowledges the claim that the applicant's removal would result in financial hardship for his spouse as he is the principal breadwinner for the family, we do not find the record to support this assertion. The most recent documentation of the applicant's and his spouse's incomes are the 2006 earnings statements and 2005 tax records just noted, neither of which are recent enough to serve as proof of their incomes at the time the appeal or motion was filed. Moreover, beyond the 2010 mortgage and insurance statements, the applicant has provided no documentary evidence of the financial obligations that his spouse would face in his absence, including proof that she has or is incurring debt as a result of her return to school. While we note the 2006 Security Agreement entered into by the applicant, it does not appear from its terms and the applicant does not claim that his spouse would bear any personal financial liability should his removal result in his default on the balance of the \$80,000 loan. Absent documentary evidence of the applicant's and his spouse's

incomes and expenditures, the AAO cannot determine that the applicant's spouse would experience financial hardship in his absence.

We also find no evidence in the record to support the claim that the applicant's spouse is suffering from depression as a result of the applicant's immigration situation. Without more documentary evidence, e.g., a psychological evaluation or other medical evidence, the assertion made by the applicant's spouse's mother is insufficient proof of emotional hardship. 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, while the denial of the applicant's waiver application will undoubtedly result in considerable hardship for his spouse, the record does not provide sufficient evidence to demonstrate that the hardship factors noted in the record, individually or in the aggregate, would result in hardship beyond that normally created by the separation of a family. Therefore, the applicant has not demonstrated that his spouse would experience extreme hardship if the wavier application is denied and she remains in the United States without him.

In her most recent statement, the applicant's spouse asserts that relocation would result in hardship for her as she loves the United States and, further, has no family in Colombia. She states that her only family members, her mother and brother, live in the United States. The applicant's spouse also contends that Colombia is not a safe place and that she fears living there.

In her statement, the applicant's mother-in-law asserts that her daughter's relocation to Colombia would affect her personally. She states that her daughter's departure from the United States would be devastating for her as her daughter is her only relative in the United States.

In considering the applicant's spouse's assertions regarding her safety in Colombia, the AAO notes that her concerns are supported by the travel warning that the U.S. Department of State has issued for Colombia. While the travel warning, last updated on February 21, 2012, reports that conditions have improved significantly in recent years, it continues to warn U.S. citizens that narco-terrorism and violence associated with emerging criminal groups pose problems throughout Colombia. We further acknowledge that returning to Colombia would be difficult for the applicant's 30-year-old spouse as she has lived in the United States since she was 12 years of age and would be separated from her family in the United States.

While we have also taken note of the applicant's mother-in-law's claim that her daughter's return to Colombia would be devastating for her, the applicant's mother-in-law, as previously discussed, is not a qualifying relative for the purposes of this proceeding. As no evidence in the record establishes how the emotional hardship experienced by the applicant's mother-in-law as a result of separation would affect her daughter, the only qualifying relative, her hardship is not found relevant to a determination of extreme hardship in this matter.

Having reviewed the record, the AAO concludes that when the specific hardship factors articulated by the applicant's spouse and the disruptions and difficulties normally created by relocation are considered in the aggregate, the applicant has established that returning to Colombia would result in extreme hardship for his spouse.

We can, however, 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 relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the applicant's spouse.

In that the record does not establish extreme hardship to a qualifying relative as a result of the applicant's inadmissibility, he has not established eligibility for a waiver under section 212(h) of the Act. 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 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 underlying application will remain denied.

**ORDER:** The underlying application remains denied.