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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 05 2013 Office: BANGKOK, THAILAND 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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Bangkok, Thailand. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Vietnam 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 a crime involving moral turpitude. The applicant's spouse and child are U.S. citizens. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The field office director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 30, 2011.

On appeal, counsel asserts that the applicant's spouse and child will experience extreme hardship if the waiver application is denied. *Form I-290B*, received September 30, 2011.

The record includes, but is not limited to, counsel's brief, statements from the applicant and his spouse, statements from family members, medical records, a psychological evaluation, country conditions information on Vietnam, a counselor's letter, financial records and educational records. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
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> 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.) (b)(6)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. 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." 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. *Id.* 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.

On September 29, 2007, the applicant was convicted in violation of Vietnam Penal Code, Article 138 of stealing property. He was sentenced to three years imprisonment, which was suspended, and four years of probation. As the applicant has not contested his inadmissibility on appeal, and the record does not show that determination to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

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

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
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> . . . .

> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse and child are the qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the 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.

Counsel states that the applicant's daughter would not have access to the same U.S. educational opportunities; the applicant's spouse is sensitive to the abundant air pollution and often becomes sick from the local food; she cannot speak Vietnamese; and she has no family ties in Vietnam.

The applicant's spouse states that not speaking the language limits her ability to function independently in Vietnam; living in Vietnam with her daughter with continual outbreaks of communicable diseases places both of them in a state of extreme hardship; Vietnam reported significant dengue activity in 2011 and several other communicable diseases are prevalent in Vietnam; her daughter contracted bronchiolitis on a trip to Vietnam and not having dependable health care made it unbearable; food safety is a major concern in Vietnam; the U.S. State Department has determined that medical facilities in Vietnam do not meet international standards and frequently lack medicines and supplies; traffic safety and road conditions are issues according to the U.S. State Department; the applicant suffered a severe motorbike accident when a vehicle swerved into him and the extent of post-surgical care was a daily shot; the applicant showed signs of depression and her dealing with that alone without her family was tough; and the applicant struggles with significant difference in his abilities post-accident including poor memory.

She states that she left Vietnam to give birth to her daughter based on her experiences with medical facilities in Vietnam; the U.S. State Department assigns a hardship differential for employee compensation due to extraordinarily difficult living conditions, and [redacted] is on the higher end; there has been an uptick in crime targeted at expatriates according to the U.S. consulate; according to Amnesty International, freedom of expression and discrimination against religious minorities are major concerns; her debts are in good standing as she has been able to defer her

payments while in school; she would not be able to pay off her student loans if she lived in Vietnam; her student loans are more than $43,000; she would be unable to afford anything but the most occasional trips to the United States and critical family relationships would be severed; and she worries about her daughter's emotional well-being. The record reflects that the applicant lives in and that the applicant's spouse previously lived there for a short period of time.

The applicant's spouse states that she is the primary caretaker for her grandparents; her grandfather tripped and cut his leg and hid his injury; she observed him limping, cleaned his wound and made medical arrangements; and her daughter is close with her grandparents and her mother. The applicant's spouse's grandfather states that he fell and cut his leg; the applicant's spouse lives with him and cares for him and his spouse; and she insisted he get medical care and she helped him with treating the infection. Family members of the applicant's spouse detail her close connection to her family and her role as the caretaker for her grandparents who have mental and physical issues.

The record includes a letter from a church deacon verifying the applicant's spouse's faith and her attendance at church and articles on religious issues for Christians in Vietnam. The record includes college enrollment verification and evidence of her student debt.

The record includes Centers for Disease Control and Prevention information on the dengue virus; an article from ProMED reflecting that more than 31,000 people contracted dengue fever in Vietnam in the first eight months of 2011; a report from the World Health Organization on communicable diseases in Vietnam; U.S. Department of State information on country conditions in Vietnam, hardship pay in and crime against expatriates in and Amnesty International information on human rights in Vietnam.

The record includes medical records for the applicant's spouse from Vietnam. The record includes medical records for the applicant's daughter reflecting that she had severe bronchopneumonia in Vietnam. The record includes a doctor's letter for the applicant's mother-in-law reflecting that she is worried about her daughter and it would be helpful for her blood pressure and stress level if her daughter and son-in-law could be in the United States. The applicant's spouse's grandfather's physician states that he has multiple chronic medical conditions including bipolar disorder. The record includes medical records for the applicant's spouse's grandfather.

The record reflects that the applicant's spouse's family ties are in the United States, she is close to her family and she cares for her grandparents with medical conditions. In addition, she does not speak Vietnamese and she has valid concerns related to her and her daughter's medical care in Vietnam. The AAO also notes the concerns for her daughter's education, her financial debt in the United States, religious issues and country conditions in Vietnam. Considering the hardship factors presented, and the normal results of relocation, the AAO finds that the applicant's spouse would experience extreme hardship upon relocation to Vietnam.

The applicant's spouse states that living and working as a single mother will not allow her to fund the cost of raising a child, paying off her student loans and making regular flights to Vietnam. She states that as a dual income family their financial state would be manageable; the applicant is fluent

in English and has marketable IT skills; and international travel would not be necessary to keep the family together. She states that she is devastated at the prospect of separation from the applicant who is dealing with the fall-out from his accident. Family members of the applicant's spouse detail the physical, emotional and mental hardship that she is experiencing.

Counsel states that the applicant's spouse was looking forward to the applicant's assistance in caring for her grandparents; the applicant is a devoted husband and father; the applicant's spouse is unemployed while completing her master's degree; and his spouse would have severe career disruption, resulting in financial and emotional difficulty.

The record reflects that the applicant's spouse was attending psychotherapy sessions in 2009 due to feeling overwhelmed and frustrated from separation from the applicant; she discussed depression and anxiety related to her life experiences and stressors involving separation from the applicant; and she discussed the anxiety involved with having an infant daughter without the applicant to share in the experience.

The applicant's spouse was evaluated by a psychologist who states that she has difficulty falling asleep, has trouble focusing, is persistently sad, has crying spells, and has a poor appetite; and he diagnosed her with Adjustment Disorder with Mixed Anxiety and Depressed Mood. He also states that her daughter is at risk to develop depressive and a separation disorder symptomatology due to separation from her father.

The record reflects that the applicant's spouse would be raising her young child without the applicant. The record reflects that she would experience significant emotional and mental issues without the applicant. In addition, the applicant would likely be able to assist financially and with caring for his spouse's grandparents. Considering the hardship factors presented, and the normal results of separation, the AAO finds that the applicant's spouse would experience extreme hardship upon remaining in the United States.

As the AAO has found extreme hardship to the applicant's spouse, it will not address whether his daughter would experience extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long

> duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (citations omitted).

The adverse factor in the present case is the applicant's conviction.

The favorable factors include the presence of the applicant's U.S. citizen spouse and child, extreme hardship to his spouse and hardship to his child.

The AAO finds that the criminal violation committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted.

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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained. The waiver application is approved.