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

(b)(6)

U.S. Citizenship and Immigration Services

Date: FEB 2 6 2013 Office: PHOENIX, AZ 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico 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 director stated that the applicant seeks 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 her 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 argues that U.S. Citizenship and Immigration Services (USCIS) erred in finding that the applicant's conviction for violation of Ariz. Rev. Stat. Ann. § 13-2102 was for a crime involving moral turpitude. Counsel contends that USCIS abused its discretion for its failure to review and properly weigh the submitted evidence. Counsel submitted evidence of the applicant's mother's health problems.

We will first address the finding of inadmissibility.

The applicant was found to be inadmissible for having been convicted of a crime involving moral turpitude. 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 –
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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.)

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.

The record reflects that on September 1, 2004, the applicant pled guilty to and was convicted in Arizona of theft of a credit card or obtaining a credit card by fraudulent means in violation of Ariz. Rev. Stat. Ann. § 13-2102. The judge suspended imposition of the sentence and placed the applicant on probation for 18 months.

At the time of the applicant's conviction, Ariz. Rev. Stat. Ann. § 13-2102 provided that:

> A. A person commits theft of a credit card or obtaining a credit card by fraudulent means if the person:
> 1. Controls a credit card without the cardholder's or issuer's consent through conduct prescribed in § 13-1802 or 13-1804; or
> 2. Sells, transfers or conveys a credit card with the intent to defraud; or
> 3. With intent to defraud, obtains possession, care, custody or control over a credit card as security for debt.
> B. Theft of a credit card or obtaining a credit card by fraudulent means is a class 5 felony.

Ariz. Rev. Stat. Ann. § 13-1802 stated that:

> A. A person commits theft if, without lawful authority, the person knowingly:
> 1. Controls property of another with the intent to deprive the other person of such property; or
> 2. Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use; or
> 3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services; or
> 4. Comes into control of lost, mislaid or misdelivered property of another under circumstances providing means of inquiry as to the true owner and appropriates such property to the person's own or another's use without reasonable efforts to notify the true owner; or
> 5. Controls property of another knowing or having reason to know that the property was stolen; or
> 6. Obtains services known to the defendant to be available only for compensation without paying or an agreement to pay the compensation or diverts another's services to the person's own or another's benefit without authority to do so.
> B. A person commits theft if, without lawful authority, the person knowingly takes control, title, use or management of a vulnerable adult's property while acting in a position of trust and confidence and with the intent to deprive the vulnerable adult of the property. Proof that a person took control, title, use or management of a vulnerable adult's property without adequate consideration to the vulnerable adult may give rise to an inference that the person intended to deprive the vulnerable adult of the property.

Ariz. Rev. Stat. Ann. § 13-1804 stated that "[a] person commits theft by extortion by knowingly obtaining or seeking to obtain property or services by means of a threat."

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 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). Crimes that include as a requirement an intent to defraud have been held, as a general rule, to involve moral turpitude. *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992). In *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1076 (9th Cir. 2007), the Ninth Circuit stated that when intentional fraud is an element of the offense, the offense qualifies as a crime of moral turpitude. As to stolen property, where property is acquired without knowledge that it is stolen or without intent to deprive the rightful owner of his possession, the offense does not involve moral turpitude. *See Matter of K*, 2 I&N Dec. 90 (BIA 1944)

Ariz. Rev. Stat. Ann. § 13-2102 is a divisible statute. It is clear that the proscribed conduct in § 13-2102(A)(2) and (A)(3) would involve moral turpitude for these acts are committed with the intent to

defraud. Section 13-2102(A)(1) prohibits the control of a credit card without the cardholder's or issuer's consent through conduct prescribed in § 13-1802 or 13-1804. The language of § 13-1802 encompasses conduct involving moral turpitude and conduct that does not. A person who knowingly controls property of another with the intent to deprive the other person of such property violates § 13-1802(A)(1). By its terms, § 13-1802(A)(1) does not require a perpetrator to have the intent to permanently deprive the owner of his or her property. In *State v. Harris*, 655 P.2d 1339, 1340 (Ariz. App. 2d Div. 1982), the Court of Appeals of Arizona found the defendant guilty of theft under § 13–1802(A)(1) and stated that a person commits theft if, without lawful authority, he knowingly controls property of another with the intent to deprive them of such property. The language of § 13-2102 thus encompasses conduct involving moral turpitude and conduct that does not, and an actual case exists in which § 13-2102 was applied to conduct that did not involve moral turpitude, and as such, a conviction under the statute is not categorically a crime of moral turpitude.

In regard to the modified categorical approach, the record of conviction in the instant case consists of the plea agreement, sentencing documents, the court's information sheet, the minute entry, and the indictment. The indictment stated that the applicant "on or about the 14th day of December, 2003, without the consent of Visa credit card, knowingly controlled the credit card of ' This does not reflect that the applicant was convicted under Ariz. Rev. Stat. Ann. § 13-2102 for intending to deprive the owner of her property permanently. However, the applicant stated in the letter dated January 16, 2009 that she stole her employer's credit card so that she could go shopping and buy clothing for her daughters. As this is evidence that a permanent taking was intended, the AAO can find that the applicant's offense constitutes conduct involving moral turpitude, pursuant to the holding in *Castillo-Cruz*. Therefore, the applicant is 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 found 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 -
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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 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-Moralez,* 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.

In regards to the applicant's mother, Dr. stated in the letter dated April 21, 2010 that the applicant's mother has multiple medical conditions including diabetes melleitus II, obstructive sleep apnea syndrome, hypothyroidism, degenerative disc disease, gastroesophageal reflux disease, and had three strokes (in 2006, 2007 and 2009) and was hospitalized three occasions in 2009. Dr. stated that the applicant's mother is disabled and unable to fully care for her own healthcare needs and that the applicant has been her mother's caregiver for several years. The applicant's mother asserted in the letter dated December 30, 2008 that she has been disabled for three years and receives social security benefits. She stated that she is depressed and upset thinking that the applicant will not get her papers. The applicant's mother declared that her 25-year-old son, is developmentally disabled and has epilepsy and requires 24-hour care; and when she is ill, she depends on the applicant to help with her son. She stated that the applicant assists her in paying bills, writing letters and household chores. She expressed concern about the applicant's health. The submitted letter dated January 29, 2009 from Dr. states that the applicant has adult onset diabetes mellitus, anemia, chronic headaches, hypertriglyceridemia and depression. The applicant's father stated in the affidavit dated December 30, 2008 that the applicant takes his wife to doctor appointments and prepares meals when she is ill.

As to the hardship to the applicant's daughters, letters from the applicant's family members state that the applicant has a close relationship with her girls and needs to be with them to ensure they have opportunities such as college. The record reflects that the applicant's U.S. citizen daughters were born on May 16, 1995 and October 31, 2000.

The asserted hardship to the applicant's mother and daughters in remaining in the United States while the applicant lives in Mexico is emotional in nature. The applicant's mother contends that she requires the applicant to assist in taking her to appointments, preparing meals, doing household chores, and assisting with However, in that the applicant works full time, the applicant's mother appears to be able to carry out daily life activities without assistance from the applicant. In addition, the waiver application reflects that the applicant's sibling, was involved in care while he was hospitalized. The AAO acknowledges that the applicant's daughters, husband and mother will experience hardship in remaining in the United States while the applicant lives in Mexico. However, when the asserted hardships in the instant case are considered together, the applicant has not demonstrated their hardship will be extreme in that it is more than the common or typical result of inadmissibility.

In regards to the hardships of relocating to Mexico to live with the applicant, the record contains news articles and information about Mexico. Information from the U.S. Department of State describes violent drug-related crime in Mexico and human rights violations. U.S. Department of State, Bureau of Consular Affairs, *Country Specific Information – 2009: Mexico* (June 30, 2009); US. Department of State, Bureau of Consular Affairs, Travel Alert (August 20, 2009); U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2008: Mexico* (February 25, 2009). The article "How Mexico's health system works" describes improvements to Mexico's health care system, but indicates that in rural areas the

health system remains fractured and adequate medical training is needed. While these documents convey general conditions in Mexico, the applicant has not described the specific hardships that her parents and husband and daughters will experience in joining her to live in Mexico. As such, the applicant has not demonstrated that their hardship in living in Mexico will be extreme.

In sum, based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she 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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.