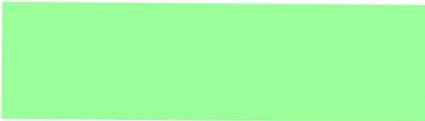


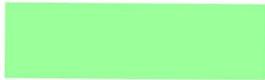


**U.S. Citizenship
and Immigration
Services**

(b)(6)



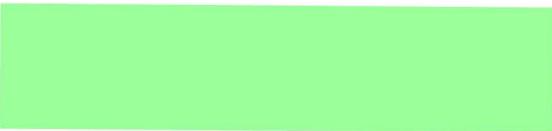
DATE: **JUN 04 2013** Office: NEWARK

FILE: 

IN RE: 

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,

A handwritten signature in black ink, appearing to read "Michael Shumway".

Ron Rosenberg, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Officer Director, Newark, New Jersey. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ecuador and is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside in the United States with his U.S. lawful permanent resident spouse and U.S. citizen children. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen daughter.

In a decision dated March 31, 2012, the Field Office Director concluded that the applicant did not establish that a qualifying relative would suffer from extreme hardship and the application was denied accordingly.

On appeal, counsel for the applicant states that the applicant's spouse and children will suffer extreme hardship as a result of the applicant's inadmissibility.

The record contains, among other documentation, statements from counsel, statements from the applicant's spouse, statements from the applicant, a statement from the applicant's daughter, documentation pertaining to the applicant's spouse's employment and health, documentation pertaining to the applicant's health, documentation pertaining to the applicant's daughter's employment, and documentation regarding the applicant's criminal and immigration history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2) of the Act provides, in pertinent part:

(A)(i) Except as provided in clause (ii), any 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, or...

is inadmissible. . . .

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

...

(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 record establishes that the applicant was convicted of Retail Theft, in violation of 18 Pa.C.S.A. § 3929 on February 11, 2003 in the Court of Common Pleas of Montgomery County, Pennsylvania. The applicant was placed into an accelerated rehabilitation program where he was ordered to serve 12 months of probation, pay court costs, perform 50 hours of community service, and attend a parenting class.

Pennsylvania Criminal Code § 3929, states, in pertinent part:

Retail theft

(a) Offense defined.--A person is guilty of a retail theft if he:

(1) takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof;

...

(b) Grading.--

(1) Retail theft constitutes a:

(i) Summary offense when the offense is a first offense and the value of the merchandise is less than \$150.

(ii) Misdemeanor of the second degree when the offense is a second offense and the value of the merchandise is less than \$150.

(iii) Misdemeanor of the first degree when the offense is a first or second offense and the value of the merchandise is \$150 or more.

...

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.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General, clarified that for a crime to qualify as a crime involving moral turpitude (CIMT) for purposes of the Act, it “must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.” The BIA has also held that a finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. *See Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (finding that an aggravated assault against a peace officer, which results in bodily harm to the victim and which involves knowledge by the offender that his force is directed to an officer who is performing an official duty, constitutes a crime involving moral turpitude); *see also Matter of Solon*, 24 I&N Dec. at 245 (finding that the offense of assault in the third degree in violation of section 120.00(1) of the New York Penal Law is a crime involving moral turpitude, as such an offense requires both a specific intent to cause injury and physical injury to the victim).

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. *Matter of Silva-Trevino*, 24 I&N Dec. 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).

Where the conviction is not categorically a CIMT, a modified categorical inquiry is used to inspect the specific documents comprising the record of conviction (such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the plea transcript) to discern the nature of the underlying conviction. *Id.* at 690, 698-99. The AAO notes that this matter arises under the jurisdiction of the Court of Appeals for the Third Circuit which has held that the *Matter of Silva-Trevino* framework, to the extent that it allows for an inquiry beyond the record of conviction, will not be applied. *See Jean-Louis v. Attorney General of the United States*, 582 F.3d 462, 470-71 (3d Cir. 2009).

Theft has long been held to be a CIMT. *Matter of Garcia*, 11 I. & N. Dec. 521 (BIA 1966). The Board of Immigration Appeals (BIA) has held that, in order to constitute a CIMT, a conviction for theft must involve a permanent taking. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that a violation of

Pennsylvania's retail theft statute reasonably allowed for the presumption that the conduct involved an intent to permanently deprive the owner of their property. The record of conviction in the applicant's case makes clear that that the applicant's convictions involved retail theft, a violation of Pennsylvania Criminal Code § 3929(a)(1)(iii), which involves the intent to permanently deprive and merchandise valuing \$150 or more. The applicant's conviction for retail theft constitutes a crime involving moral turpitude. The applicant does not contest this finding on appeal. The AAO notes that that on the same occasion as the above conviction, the applicant was also convicted of receiving stolen property in violation of 18 Pa.C.S.A. § 3925. And, on April 17, 2007, he was convicted of Driving under the Influence and Careless Driving in the Criminal Court of [REDACTED] Pennsylvania. The record of conviction for the latest offense is not complete and does not indicate the exact section of the Pennsylvania Code under which he was convicted. As the record already establishes that the applicant has been convicted of one crime involving moral turpitude that does not qualify for the petty offense exception, we do not need to make a determination in regards to the applicant's other convictions.

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

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

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --

...

(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; or

...

The AAO notes that the record indicates that the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act which provides, in pertinent part that,

(i)...Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record indicates that the applicant was apprehended by immigration officials on July 5, 1994 near the [REDACTED] port-of-entry. The applicant provided a name other than his own and stated that he was from El Salvador where he feared persecution. The applicant was processed for release on bond based on this false information. The applicant later stated, in conjunction with his application for adjustment of status, that he provided the false information because he did not want to be removed to his native Ecuador. The AAO finds that the applicant made a material misrepresentation in order to obtain a benefit under the Act, namely release on bond. As a result,

he is also inadmissible under section 212(a)(6)(C) of the Act. The applicant was previously advised of his inadmissibility under this ground in the July 14, 2004 decision denying his previous application for adjustment of status.¹

The applicant's inadmissibility may be waived under section 212(i) of the Act, which states:

The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a U.S. citizen or lawful permanent resident spouse or parent. Hardship to the applicant or his children is not considered in 212(i) waiver proceedings unless it is shown to cause hardship to a qualifying relative, in this case the applicant's spouse. Before we may assess the applicant's eligibility for a waiver under section 212(h), we must first assess his eligibility under section 212(h), which is a more restrictive standard as it does not allow for consideration of hardship to the children of the applicant. 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-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 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.

¹ The AAO notes that the applicant was also found to be inadmissible under section 212(a)(6)(E) of the Act in that same decision; however, the AAO does not find evidence in the record of proceeding that supports that finding.

The Board has also held that the common or typical results of deportation, 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, 885 (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 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.

On appeal, counsel states that the applicant’s U.S. lawful permanent resident spouse, as well as the applicant’s adult U.S. citizen children, would suffer extreme hardship as a result of the applicant’s inadmissibility. As the applicant is inadmissible under section 212(a)(6)(C) of the Act, hardship to the applicant’s children will only be taken into account on appeal to the extent that hardship to them is shown to affect hardship to the applicant’s qualifying relative, his spouse. Moreover, the AAO notes that no evidence was provided in regards to hardship to the applicant’s 25-year-old

son. Additionally, the only evidence provided in regards to the applicant's 24-year-old daughter was in relation to her university studies which the record indicates that she completed in April 2012.

In regards to the hardship to the applicant's U.S. lawful permanent resident spouse, counsel states that in addition to financial hardship, the applicant's spouse would suffer emotional and psychological hardship due to separation from the applicant. The applicant's spouse states that she feels "emotionally depressed and anxious making it hard to sleep at night." Additionally, she states that she has seen a psychiatric specialist to assist her in resolving her condition. In support of that statement, the record contains two prescriptions written on April 11, 2012 by [REDACTED] M.D., one diagnosing the applicant's spouse with Adjustment Disorder and the other prescribing medication for the applicant's spouse's insomnia. The AAO notes that significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are relevant factors in establishing extreme hardship. Absent an explanation in plain language; however, from the treating physician of the exact nature and severity of any condition and a description of any treatment or family assistance needed, the AAO is not in the position to reach conclusions concerning the severity of a medical condition or the treatment needed. The AAO notes the documents submitted from Dr. [REDACTED] but those documents provide no information on how the applicant's spouse's condition is affected by the applicant's inadmissibility, how the applicant may be of assistance to the patient, or how the applicant's spouse's adjustment disorder may or may not be affecting her day-to-day well-being.

Counsel also states that "the financial ramifications of forcing [the applicant] to return to Ecuador are clearly expressed by the fact that according to the CIA World Factbook, the GDP per capita in Ecuador is a meager \$8,300 per year and the poverty rate is above 28%." Counsel did not provide a copy of the report that she cites, nor did she provide documentation to illustrate how the applicant's income in Ecuador would affect the financial health of his spouse. The record indicates that as of April 9, 2012, the applicant's spouse worked as a home attendant. There is no record, however, of her current income. The most recent records are from 2008, which indicate that the applicant's spouse reported earning \$31,049.14 on her federal income tax returns. The record does not contain any documentation of the applicant's income or of the family's expenses. The AAO notes that although the applicant's spouse's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). 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)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Based on this limited information it is not possible to determine

the degree of financial hardship that the applicant's spouse would suffer in the applicant's absence. Although the AAO notes that the applicant's spouse would likely endure hardship as a result of long-term separation from the applicant, the record does not establish that the hardships she would face, considered in the aggregate, rise to the level of "extreme."

Counsel does not state what hardship the applicant's spouse would suffer if she were to relocate to Ecuador with the applicant, but rather counsel and the applicant's spouse state that the applicant would suffer hardship because he would not be able to obtain employment or obtain treatment for his heart condition. As noted above, hardship to the applicant is only relevant insofar as it is shown to affect the hardship to the applicant's qualifying relative, his spouse. Here, counsel has not established that the applicant would be unable to obtain employment in Ecuador or obtain medical treatment there. Also, there is also no indication or documentation in the record of how these stated concerns would affect the applicant's spouse. The AAO notes that the record does not contain any country conditions information on Ecuador, or more specifically, it does not document what a carpenter or home health aide could expect to earn in that country. Additionally, the record does not establish what the applicant and his spouse's expenses would be in Ecuador or that they could not pay for their basic needs there. Again, 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. at 165. The AAO notes the applicant's spouse's family ties in the United States, including her two U.S. citizen children; however, the record does not establish how the applicant's spouse's relationship with her adult children would be affected should she relocate to Ecuador. Again, it is the applicant's burden of proof in these proceedings. Based on the information provided, considered in the aggregate, the evidence does not illustrate that the hardship suffered in this case, should the applicant's spouse relocate to Ecuador, would be beyond what is normally experienced by families dealing with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383.

Although the applicant's qualifying relative's concerns over the applicant's immigration status are neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(i) of the Act, be above and beyond the normal, expected hardship involved in such cases.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, 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 a qualifying relative as required under section 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether he merits a waiver as a matter of discretion.

In proceedings regarding a waiver of grounds of inadmissibility under sections 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.