



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

(b)(6)

[Redacted]

DATE: **MAR 08 2013**

OFFICE: MIAMI, FLORIDA

File: [Redacted]

IN RE:

Applicant: [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.

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Bolivia and a citizen of Italy 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 been convicted of a crime involving moral turpitude.¹ The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen daughter.

The field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility accordingly. *See Decision (and Amended Decision) of the Field Office Director*, both dated May 13, 2011.

On appeal counsel asserts that a conviction under Florida Statutes § 812.014(1) is not a crime involving moral turpitude, that the immigration officer did not conduct a proper evaluation of whether the applicant's conviction is for a crime involving moral turpitude, and that if a waiver is indeed required but not granted the applicant's children and grandchildren will suffer extreme hardship. *See Counsel's Appeal Brief*, dated June 13, 2011.

The record contains, but is not limited to: Form I-290B, counsel's appeal brief and earlier brief in support of a waiver; various immigration applications and petitions; a hardship statement from the applicant's daughter; a statement from the applicant; an affidavit of support filed by the applicant's daughter on behalf of the applicant along with a single tax return and report of miscellaneous income; the applicant's Italian passport with which she entered the United States in February 2010; and documentation concerning the applicant's criminal record. The entire record was reviewed and considered in rendering this decision on the appeal.

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 –

¹ The field office director incorrectly states that the applicant is "requesting relief from inadmissibility under section 212(a)(6)(C)(i) for grand theft in the third degree," and requires a waiver under section 212(i) of the Act. The field office director appears to conflate inadmissibility for fraud/misrepresentation with inadmissibility for having been convicted for a crime involving moral turpitude. As the field office director's decision contains no explanation or basis for a finding that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, all findings concerning section 212(a)(6)(C)(i) inadmissibility or references by the field office director related thereto are hereby withdrawn.

(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.)

The present case falls within the jurisdiction of the Eleventh Circuit Court of Appeals. In evaluating whether an offense constitutes a crime involving moral turpitude, the Eleventh Circuit employs the categorical and modified categorical approach. *Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1305-06 (11th Cir. 2011). “To determine whether a conviction for a particular crime constitutes a conviction of a crime involving moral turpitude, both [the Eleventh Circuit] and the BIA have historically looked to ‘the inherent nature of the offense, as defined in the relevant statute’” *Id.* at 1305. “If the statutory definition of a crime encompasses some conduct that categorically would be grounds for removal as well as other conduct that would not, then the record of

conviction—i.e., the charging document, plea, verdict, and sentence—may also be considered.” *Id.* (citing *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354–55 (11th Cir.2005)).

The Eleventh Circuit has rejected the methodology adopted by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). *Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1308-11 (11th Cir. 2011). While the Attorney General determined that assessing whether a crime involves moral turpitude may include looking beyond the record of conviction, the Eleventh Circuit has stated that “[w]hether a crime involves the depravity or fraud necessary to be one of moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct.” *Itani v. Ashcroft*, 298 F.3d 1213, 1215–16 (11th Cir. 2002). In *Fajardo v. U.S. Atty. Gen.*, the Eleventh Circuit affirmed its reasoning in *Vuksanovic v. U.S. Attorney General*, 439 F.3d 1308, 1311 (11th Cir.2006), stating that “the determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicated a particular conviction.” *Fajardo v. U.S. Atty. Gen.* 659 F.3d at 1308-09.

The record indicates that the applicant entered the United States on February 20, 2010 and was arrested less than three weeks later for Felony Grand Theft in the Third Degree, in violation of Florida Statutes § Fl. 812.014(2)(C)(1), for her conduct on March 8, 2010. The following month, on April 20, 2010, the applicant was arrested in a separate incident for Felony Grand Theft in the Third Degree, in violation of Florida Statutes § Fl. 812.014(2)(C)(1), for her conduct on the same date. The applicant was convicted in Fort Lauderdale, Florida of Felony Grand Theft in the Third Degree, in violation of Florida Statutes § 812.014(2)(C)(1). Grand theft in the third degree is a felony punishable by a maximum term of imprisonment of five years. The applicant was sentenced on May 21, 2010 to a concurrent term of two years of probation plus monetary fines, restitution and costs.

At the time of the applicant’s conviction, Florida Statutes § 812.014, provided in pertinent parts:

- (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
 - (a) Deprive the other person of a right to the property or a benefit from the property.
 - (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
- (2)(C) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is: (1) Valued at \$300 or more, but less than \$5,000.

Counsel correctly notes that the general Florida statute under which the applicant was convicted addresses both temporary and permanent takings and cites *Jaggernaut vs. Attorney General*, 432 F.3d 1346 (11th Cir. 2005). A plain reading of Fl. Stat. § 812.014 shows that it can be violated by

knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. The BIA 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."). Therefore, the AAO cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, we will apply the modified categorical approach and engage in a second-stage inquiry by reviewing the record of conviction to determine under what section of the statute the applicant was convicted. In *In re Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals (BIA) found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The reasoning in *Jurado-Delgado* is applicable to the applicant's case. While counsel notes that the subsection under which the *Juggernaut* respondent was convicted was unclear, in the present case the applicant was clearly convicted under Florida Statute § 812.014, subsection (2)(C)(1), as plainly delineated throughout the record of conviction. The plain language of Fl. Stat. § 812.014(2)(C)(1) indicates that grand theft of the third degree and felony of third degree involve the knowing theft of property valued at between \$300 and \$5,000. Addressing the same Florida subsection, the BIA found in reviewing the Eleventh Circuit Court of Appeals decision in *Jaggernaut*, *supra*: "From these circumstances, we find it reasonable to conclude that the respondent's 2001 conviction under Fla. Stat. § 812.014 involved retail theft which is a permanent taking under *Matter of Jurado*, 24 I&N Dec. 29, 34 (BIA 2006), and therefore a crime involving moral turpitude." *See In re Jaggernaut*, (BIA June 25, 2008). The record of conviction in the present case is clear as is the fact that the applicant engaged in retail theft. Based on the foregoing, the AAO finds that the applicant has been convicted of knowingly taking the property of another with the intent to permanently deprive that person of the property, a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant is not eligible for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act because the crime for which she was convicted is punishable by a term of imprisonment of more than one year. She requires a waiver under section 212(h) 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 –

....

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

(i) the activities for which the alien is inadmissible occurred more than 15 years

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before the date of the alien's application for a visa, admission, or adjustment of status,

- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

As the applicant's conduct that led to inadmissibility under section 212(a)(2)(A)(i)(I) of the Act took place in March and April 2010, less than 15 years ago, she does not meet the requirement of section 212(h)(1)(A)(i) of the Act.

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 or child of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's U.S. citizen daughter is the only qualifying relative. 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.

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.

The applicant's daughter is a 37-year-old native of Bolivia and citizen of the United States. She indicates that she has lived for more than 10 years in the United States where she resides with her U.S. citizen husband and two U.S. citizen daughters. The applicant's daughter writes that while she and her husband are both hardworking professionals who are very successful in their careers,

they lost a significant amount of money on property investments as a result of “the economic depression that hit the real estate market in 2008.” She states that she was no longer able to afford childcare and had to stay at home with her daughters. The applicant’s daughter does not indicate the date(s) on which she ceased working and stayed at home and no corroborating documentary evidence has been submitted for the record. 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)).

The applicant’s daughter explains that when she rushed her husband to the hospital in February 2010, he was initially misdiagnosed with meningitis. While the confusion was cleared up and he was released from the hospital the following night, the applicant had already been telephoned by her daughter, quickly booked a flight to the United States and entered less than one week later. She indicates that with the applicant residing with her she was able to return to work and leave her daughters in her mother’s care. The applicant’s daughter writes that while the economy has started to improve she cannot afford to pay a babysitter, cannot imagine surviving on only her husband’s income, and opines that in the applicant’s absence she would have to stop working again and she and her husband would no longer be able to pay their bills. The only documentary evidence of a financial nature in the record is the applicant’s daughter’s Form I-864, Affidavit of Support, filed on behalf of the applicant in May 2010, a supporting joint 2008 income tax return and a Form 1099-MISC for the same tax year. The applicant indicates on Form I-864, page 4, number 25, that her adjusted gross income was \$310,865 for 2007, \$97,698 for 2008, and -\$74,823 for 2009. It appears that the tax years were incorrectly noted and likely refer to 2006, 2007 and 2008 based on the “most recent” tax return provided for tax year 2008. The AAO notes that a Form 1099-MISC for tax year 2008 indicates that the applicant’s daughter received nonemployee compensation in the amount of \$69,670.68. The record contains no more recent documentary evidence showing the applicant’s daughter’s or son-in-law’s current income. Nor does the record contain any documentary evidence demonstrating the family’s financial obligations or regular expenses. While it appears that the applicant’s daughter experienced some financial loss in 2008, the evidence in the record is insufficient to establish that if the applicant, who has resided in the United States for less than three years, were to leave the country her daughter and son-in-law would be unable to afford childcare or meet their financial obligations in her absence.

The applicant’s daughter states that the time her children have had with the applicant in the United States has been amazing, and they are enjoying her and are very attached to her. She writes that her husband’s parents died when he was young, his extended family lives in New York, and her children “don’t have anyone in the United States but their grandmother.” The AAO recognizes the difficulties inherent in losing the warm daily attachment currently shared between the applicant, her daughter, and grandchildren. However, the evidence does not establish that the challenges described rise beyond those normally associated with separation due to a loved one’s inadmissibility or removal.

The AAO acknowledges that separation from the applicant would cause various difficulties for the applicant’s daughter. However, it finds the evidence in the record insufficient to demonstrate that

the challenges encountered by the qualifying relative, when considered cumulatively, meet the extreme hardship standard.

The applicant's daughter does not address the possibility of relocating to either Italy or Bolivia to join the applicant. Though the applicant entered the United States on an Italian passport, as noted by the field office director she was residing until February 2010 with her husband and three of her children in Bolivia. While counsel contends that conditions in Bolivia are not suitable for young children, she does not specify the conditions to which she refers and no country conditions reports or related documentation concerning Bolivia have been submitted for the record. The applicant maintains that Bolivia's economy is poor and its political climate hostile and uncertain for those who do not support the current government. No corroborating documentary evidence has been submitted. The applicant adds without corroboration that her daughter and grandchildren would not be safe in Bolivia where they would have to start over in a third world country.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's daughter, including unsuitable country conditions in Bolivia not evidenced in the record. Considered in the aggregate, the AAO finds the evidence insufficient to demonstrate that the applicant's U.S. citizen daughter would suffer extreme hardship were she to relocate to Bolivia or Italy to be with the applicant.

The applicant has, therefore, failed to demonstrate that the challenges her daughter faces are unusual or beyond the common results of removal or inadmissibility to the level of extreme hardship. Accordingly, the AAO finds that the applicant has failed to demonstrate extreme hardship to a qualifying relative. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant 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 appeal will be dismissed.

ORDER: The appeal is dismissed.