



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE:

MAR 09 2013

Office: TAMPA

FILE:

IN RE:

Applicant:

APPLICATION:

Application for Waiver of Ground of Inadmissibility pursuant to 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 that any motion must 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, Tampa, 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 Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant is the spouse and parent of U.S. citizens. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in conjunction with an adjustment of status application, in order to remain in the United States as a lawful permanent resident with his spouse and minor child.

The Field Office Director concluded that the applicant had failed to demonstrate that the bar to his admission would result in extreme hardship to his qualifying relatives, as required under section 212(h) of the Act, and denied his Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated September 20, 2011.

On appeal, counsel asserts that the applicant's conviction for burglary of an unoccupied conveyance does not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. *See Form I-290B, Notice of Appeal or Motion*, dated October 20, 2011. Alternatively, he contends that the applicant had demonstrated that a bar to his admission would cause extreme hardship to his U.S. citizen spouse and child for purposes of a section 212(h) waiver.

The record of evidence includes, but is not limited to, counsel's briefs; the applicant's letter; the applicant's marriage certificate; birth certificate of the applicant's minor son; the applicant's tax returns for 2000 to 2008; a U.S. Department of State report on Cuba; and the applicant's criminal records. 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 all relevant evidence considered in reaching a 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—
  - (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 applicant is a thirty-year-old native and citizen of Cuba who was paroled into the United States on or about March 24, 2000 pursuant to section 212(d)(5) of the Act. He was approximately seventeen years old at the time. On February 28, 2001, the applicant was arrested and charged with felony burglary and petit larceny. On September 6, 2001, he was convicted of Third Degree Felony Burglary of an Unoccupied Conveyance in violation of section 810.02(4)(b) of the Florida Statutes (Fla. Stat.) and Third Degree Felony Attempted Burglary of an Occupied Conveyance under Fla. Stat. § 810.02(3)(d). *See Conviction Record and Criminal Enforcement Records*. The applicant was sentenced to 24 months of probation on both counts to be served concurrently. We note that the maximum possible penalty for a third degree felony is a term of imprisonment not exceeding five

years. See Fla. Stat. 775.082(3)(d). The applicant was arrested on two subsequent occasions for violating his probation on April 5, 2002 and September 1, 2004. On October 14, 2004, the applicant's probation was revoked and he was placed into a Community Control Program (GPS monitoring) for two years to be served concurrently on each count. Although unclear, criminal records indicate that the applicant may have also been sentenced to a suspended sentence of nine months.

The applicant was deemed inadmissible to the United States for having been convicted of crimes involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, based on his criminal convictions. Counsel disputes the finding of inadmissibility.

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 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. The methodology adopted by the Attorney General consists of a three-pronged approach. 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. *Silva-Trevino*, 24 I&N Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193). 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." *Silva-Trevino*, 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage or "modified categorical" inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Silva-Trevino*, 24 I&N Dec. 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. Finally, 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. *Id.* 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 . . . 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 (citation omitted).

Here, the applicant’s case arises under the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently rejected the *Matter of Silva-Trevino* framework and reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. See *Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the “realistic probability approach” put forth by the Attorney General in *Matter of Silva-Trevino*). In its decision, the Eleventh Circuit defined the categorical approach as “looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes “conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered.” 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

Counsel asserts that the applicant’s conviction for Burglary of an Unoccupied Conveyance does not render him inadmissible. Initially, we note that the record indicates that the applicant was ultimately charged and convicted on a second count as well, namely Attempted Burglary of an Occupied Conveyance.

At the time of the applicant’s arrest on July 28, 2001, Fla. Stat. 810.02 provided in pertinent part:

Burglary.—

- (1) (a) . . .
- (b) For offenses committed after July 1, 2001, "burglary" means:
  - 1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
  - 2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
    - a. Surreptitiously, with the intent to commit an offense therein;
    - b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
    - c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.
- (2) . . .
- (3) Burglary is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:
  - . . .

(d) Conveyance, and there is another person in the conveyance at the time the offender enters or remains.

(4) Burglary is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:

(b) Conveyance, and there is not another person in the conveyance at the time the offender enters or remains.

The Board of Immigration Appeals (BIA) has maintained that the determinative factor in assessing whether burglary involves moral turpitude is whether the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). For example, the BIA has held that burglary with intent to commit theft is a crime involving moral turpitude. *See Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). However, the BIA found that a conviction for burglary of an occupied dwelling in violation of Fl. Stat. § 810.02(3)(a) is categorically a crime involving moral turpitude because moral turpitude is inherent in the act of burglary of a dwelling that is occupied. *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009).

In the present case, the applicant was convicted of burglary of unoccupied conveyance and attempted burglary of an occupied conveyance. While the holding in *Louissaint* refers specifically to burglary of an occupied dwelling, we note that the dangers of residential burglary that serve as a rationale for that holding may, to some extent at least, also apply to burglary of an occupied conveyance, as defined by Florida law. However, as we find that the applicant has not met his burden in producing the full record of conviction, we will not reach that question. We apply the traditional categorical approach espoused by the Eleventh Circuit to determine whether the offense intended as part of the applicant's burglary conviction was a crime involving moral turpitude.

Counsel appears to be making the argument that the underlying offense intended was theft (under Fla. Stat. § 812.014) that involved only a temporary taking, and thus the burglary conviction does not constitute a crime involving moral turpitude. *See Counsel's Brief*, dated November 17, 2011, at 3 ("As this was a temporary taking, the theft conviction does not render [the applicant] inadmissible"); *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."). However, though the record contains a final judgment issued on September 6, 2001 and again, on October 14, 2004, following the applicant's probation violation, the applicant has failed to submit any other documents included in the conviction record, including the charging document or the transcript of the plea. Although the record includes a certified copy of the arrest report indicating that theft was the underlying offense, counsel correctly notes that it is not part of the conviction record that may be considered under the traditional categorical approach. We therefore cannot determine from this record that the applicant was convicted of burglary on the basis of an intended temporary, rather than permanent, taking. As the applicant, who bears the burden of proof, has not proffered the requisite documents to address his inadmissibility based on his conviction, he has failed to demonstrate that he is not inadmissible to the United States pursuant section

212(a)(2)(A)(i)(I) of the Act.

The AAO now considers the applicant's waiver application under section 212(h) of the Act to overcome his inadmissibility.

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

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) . . . (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.

Section 212(h) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296, 301 (BIA 1996). The record establishes that the applicant's qualifying relatives for purposes of this waiver are his U.S. citizen spouse and minor son.

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 of Immigration Appeals (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 v. INS*, 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.

Counsel asserts that the denial of the waiver application will result in extreme financial hardship to the applicant’s U.S. citizen wife and child upon separation. The record indicates that the applicant and his wife have been married approximately six years since October 16, 2006. They have one U.S. citizen son, [REDACTED], who is five years old. Counsel contends that the applicant is the only consistent breadwinner in the family and that the family mostly relies on his income. In support of this claim, the applicant has submitted his tax returns for the years 2000 through 2008. The tax returns alone are insufficient to demonstrate financial hardship. While we recognize that the applicant’s wife and child may suffer some financial detriment from the loss of his income, the record lacks any evidence of the couple’s financial obligations or expenses to enable the AAO to meaningfully analyze and assess the impact of separation and the loss of that income. The record also contains no statements from the applicant<sup>1</sup> or his wife, setting forth their claim of extreme financial hardship. Without documentary evidence to support the claim, the assertions of counsel

<sup>1</sup> The applicant’s letter of September 10, 2010, in response to a Request for Further Evidence issued by U.S. Citizenship and Immigration Services, does not address any hardship claims.

will not satisfy the applicant's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We also note that the applicant's tax returns for 2008 indicate that his wife owns her own business, which at that time does not appear to have generated sufficient income to support the family. Thus, there is no suggestion in the record that the applicant's wife cannot or is unable to work to support her and their son to offset the loss of her husband's income.

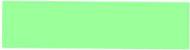
Finally, we note that courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."). Here, the applicant has not asserted any other hardship factors resulting from separation.

Having considered the evidence of record, the AAO finds that it does not demonstrate that the applicant's citizen wife and son would experience extreme hardship as a result of separation from the applicant. The applicant has not shown the hardship they would suffer constitutes "significant hardship over and above the normal disruption of social and community ties" normally associated with deportation or refusal of admission. *Matter of O-J-O-*, 21 I&N Dec. at 385.

Counsel also asserts that the applicant's wife and son would suffer extreme hardship upon relocation to Cuba. He asserts that the applicant's qualifying relatives have little or no family ties in Cuba. He maintains that conditions in Cuba are poor or substandard and that access to medical supplies, healthcare, and education is scarce. *See Counsel's Brief*, at 7. However, there is no corroborating evidence of these assertions and no statements from the applicant or his wife, both of whom are natives of Cuba, addressing the nature of the hardships they would face there and their personal knowledge of conditions there. Once again, we note that counsel's assertions are insufficient to satisfy the applicant's burden of proof in these proceedings. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Counsel does attach a copy of the 2010 U.S. Department of State Report on Human Rights Practices for Cuba in support of the relocation claim. *See Bureau of Consular Affairs, U.S. Dep't of State, 2010 Human Rights Report: Cuba* (April 8, 2011). He fails, however, to identify how the contents of the report, addressing human rights concerns in Cuba, apply specifically to the applicant and his family, or whether or why they are likely to face such concerns. Moreover, even if counsel's assertions regarding substandard medical care and conditions are accurate, this alone is generally insufficient to demonstrate extreme hardship. *Ramirez-Durazo v. INS*, 794 F.2d at 497. There is no indication that other factors exist in this case that would raise this hardship beyond the normal or usual results of inadmissibility faced by others in similar circumstances.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relatives, 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 his U.S. Citizen spouse and child as required under section 212(h) of the Act. He, therefore, remains inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. Since the applicant failed to establish statutory eligibility for the waiver, the AAO finds that no purpose would be served in considering whether he merits a waiver in the exercise of discretion.

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In proceedings for a 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 not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.