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U.S. Citizenship  
and Immigration  
Services

DATE: MAR 20 2013

Office: GUATEMALA CITY

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 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.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen Guatemala who was found to be inadmissible to the United States 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 crimes involving moral turpitude, and pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within ten years of his last departure from the United States. The applicant's spouse and two children are U.S. citizens. The applicant is applying for a waiver in order to reside in the United States.

The field office director determined that the applicant had failed to established extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated July 1, 2011.

On appeal, counsel asserts that the applicant was not convicted of a crime involving moral turpitude and that his spouse would experience extreme hardship if his waiver applicant is denied. *Brief in Support of Appeal*, undated.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statements, criminal records, financial records, country conditions information on Guatemala, psychological and therapy records, and statements from religious figures and friends. The entire record was reviewed and considered in rendering a decision on the appeal.

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

Criminal and related grounds. —

(A) Conviction of certain crimes. —

(i) In general. — 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...

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. 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 October 30, 2000 the applicant was charged with aggravated assault in violation of Florida Statutes § 784. The record reflects that the applicant's aggravated assault charge

was dropped. The record reflects that on October 30, 2000 the applicant was convicted of carrying a concealed firearm in violation of Florida Statutes § 790.01(2):

Florida Statutes § 790.01(2) provides, in pertinent part:

- (2) A person who carries a concealed firearm on or about his or her person commits a felony of the third degree...

On appeal, counsel contends that the applicant's conviction for carrying a concealed weapon is not a crime involving moral turpitude. The AAO notes the Board of Immigration Appeals (BIA) holding in *Matter of Granados*, which states that a conviction for possession of a concealed sawed-off shotgun is not a crime involving moral turpitude. 16 I&N Dec. 726, 728 (BIA 1979). In *Matter of S-*, the BIA held that carrying a concealed and deadly weapon with intent to use against the person of another is a crime involving moral turpitude because "the use of a dangerous weapon against the person of another is motivated by an evil, base, and vicious intent. The essence of the offense is the carrying of the dangerous weapon with a base, evil and vicious intent to injure another." 8 I&N Dec. 344, 346 (BIA 1959)(citations omitted). Florida Statutes § 790.01(2) pertains only to the carrying of a concealed firearm, and as such, it lacks the evil, base, and vicious intent to injure another as described in *Matter of S-*. Accordingly, the AAO finds that the applicant's conviction under Florida Statutes § 790.01(2) is not a crime involving moral turpitude.

Based on the record; the applicant is not inadmissible under section 212(a)(2)(A) of the Act for this conviction.

However, the record reflects that the applicant entered the United States without inspection on June 16, 1989. He filed Form I-589, Request for Asylum in the United States, on March 6, 1991. His asylum application was referred to an immigration judge on September 8, 2006. The application was denied and the applicant was ordered removed on October 1, 2008. He was removed from the United States on December 3, 2008. The AAO notes that the applicant was employed for several periods of time without authorization while his asylum application was pending; therefore, the pendency of his asylum application did not toll the accrual of unlawful presence. The applicant accrued unlawful presence from April 1, 1997, the effective date of unlawful presence provisions under the Act, until December 3, 2008, the date he was removed from the United States. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year and seeking readmission within ten years of his December 3, 2008 departure from the United States.

Section 212(a)(9)(B) of the Act provides, in part:

(B) Aliens Unlawfully Present

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

...  
(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.  
....

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse. 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 (BIA 1996).

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived

outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel states that the applicant’s spouse is used to the American culture, freedom of speech and religion, good education and law enforcement systems; Guatemala is in a state of political and social upheaval; food insecurity is a problem and poverty has reached high levels; drug trafficking, kidnapping and corruption are issues; the applicant is from one of the poorest regions in the country; The applicant states that he has been living as a nomad due to persecution from watching the commission of several crimes or his intervention to avoid lynching acts.

The applicant’s spouse states that she was born in Puerto Rico; there are no real resources for education in Guatemala; the quality of education is poor except in private schools; the applicant and his family live in a village; a dialect called “mam” is spoken in the applicant’s village; she only knows English and Spanish; she is scared of the kidnappings and killings in Guatemala; kidnapping is a form of extortion; many people live in hunger due to their living conditions; she and her children would be viewed as foreigners; her four sisters live in Puerto Rico and New York; her children will suffer a tremendous culture shock; there is no running water in the applicant’s village and she is

worried about her health and her children's health; she could not find employment there; the applicant has not been able to find employment in Guatemala; and the applicant lives with his brother and eight children in a house with almost no privacy.

The record includes country conditions information detailing safety and criminal issues, lack of opportunity for children in rural areas, education issues, food insecurity and employment discrimination against women.

The record reflects that the applicant's spouse has resided in Puerto Rico and the United States during her life. Her sisters reside in the United States. She does not have ties Guatemala, other than the applicant, and there are language issues for her. In addition, she would be raising her young children, who would lose educational opportunities. The AAO notes that the applicant resides in a rural area in an overcrowded house. The AAO notes the country conditions information provided in the record. Considering the hardship factors presented, and the normal results of relocation, the AAO finds that the applicant's spouse would experience extreme hardship if she relocated to Guatemala.

The applicant states that he is unemployed in Guatemala and is unable to support his family like he did before; he was not able to finish the construction on his house in the United States and this is an imminent hazard for his children; his wife and children will lose the house due to failure of payments; and his spouse fears for his life.

The applicant's spouse details the emotional hardship that she and her children are experiencing without the applicant, and the assistance that the applicant would provide in caring for their children. She states that the applicant has received death threats on two occasions. The applicant's spouse was diagnosed by a psychologist with Major Depressive Disorder, recurrent, moderate and Adjustment Disorder, unspecified. The psychologist states that she presents some criteria for post-traumatic stress disorder; her symptoms have included tight chest, headaches, dizziness, rosacea breakouts, anhedonia, fatigue, and sleeping issues; her children have emotional issues from separation; the applicant is the provider for the family; and she is afraid of losing the applicant as there have been threats to kill him.

A reverend and his spouse states that the applicant's son has attended psychological counseling; his daughter has developed symptoms of despair and crying during the night; and the applicant's spouse has battled with paying expenses to keep the household afloat. The record reflects that the applicant's has undergone therapy and has been diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood.

The record reflects that the applicant's home loan has been referred to bank attorneys with the instructions to begin foreclosure proceedings. The record includes evidence of various bills and that the applicant earned significantly more income in the United States than his spouse. The record reflects that the applicant's spouse has been enrolled in WIC and Medicaid programs.

The record reflects that the applicant's spouse is experiencing significant emotional and psychological hardship without the applicant. In addition, she is experiencing significant financial hardship without him. She is raising two children on her own, both of whom are experiencing emotional hardship without the applicant. Considering the hardship factors presented, and the normal results of separation, the AAO finds that the applicant's spouse would experience extreme hardship if she remained in the United States.

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

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

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

The adverse factors in the present case are the applicant's entry without inspection, unauthorized period of stay, unauthorized employment and criminal record.

The favorable factors include the presence of the applicant's U.S. citizen spouse and children, extreme hardship to his spouse, payment of taxes and the lack of a criminal record since 2001. The applicant states that he does not drink alcoholic beverages anymore. The applicant completed the terms of his supervision and it was terminated on November 18, 2002. The record includes numerous statements from religious leaders and friends of the applicant detailing his good character. The record reflects that he has been rehabilitated from his criminal past.

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

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.