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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[REDACTED]

Date: **MAY 21 2013**

Office: NEWARK, NJ

FILE: [REDACTED]

IN RE: [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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Colombia 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 crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse, U.S. citizen child, U.S. citizen stepchild, lawful permanent resident child, and lawful permanent resident father.

In a decision dated June 11, 2012, the field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on his U.S. citizen spouse and denied the waiver application accordingly.

In a Notice of Appeal to the AAO (Form I-290B) dated July 9, 2012, counsel states that the field office director made erroneous conclusions of fact and law and that the applicant has five qualifying relatives who would suffer extreme hardship as a result of his inadmissibility.

The record of hardship includes: statements from the applicant's children and stepchild; financial documentation; medical documentation; a psychological evaluation for the applicant's spouse; and country conditions information or Colombia.

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.

(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.)

In determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3rd Cir. 2009), makes a categorical inquiry, which consists of looking “to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute.” *Id.* at 465-66. The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute “fits” within the requirements of a CIMT.” *Id.* at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The record shows that on or about April 24, 1992, the applicant pled guilty to Shoplifting under New Jersey Statutes Annotated §2C:20-11. In addition, on May 30, 2006 the applicant was found guilty of Offering a False Instrument for Filing under N.J.S.A. §2C:21-3b.

In *In re Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals 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 conviction for shoplifting.

At the time of the applicant's conviction, N.J.S.A. §2C:21-3b stated:

b. Offering a false instrument for filing. A person is guilty of a disorderly persons offense when, knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant with knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.

The BIA has held that the mere possession of false or fraudulent documents does not involve moral turpitude. *See, e.g., Matter of Serna*, 20 I. & N. Dec. 579, 585-86 (B.I.A.1992) (holding that mere possession of illegal documents, without intent to use said documents fraudulently or unlawfully, is not a crime involving moral turpitude). However, N.J.S.A. §2C:21-3b indicates that to be convicted under this statute a person must have offered a false statement, but also have used the false statement or false information in the course of some action with the intent of committing a crime involving moral turpitude, in this case, filing false information as public record. As such, the applicant's conviction under this statute is outside the scope of cases involving mere unlawful possession of false or fraudulent documents. Accordingly, because the applicant's conviction involves knowing behavior connected to the affirmative action of filing false information, beyond mere possession, his conviction is for a crime involving moral turpitude. *See, e.g., Kabongo v. INS*, 837 F.2d 753, 758 (6th Cir.1988) (finding that alien's convictions for making false statements and obtaining government funds by fraud involved moral turpitude because the alien made dishonest statements); *Zaitona v. INS*, 9 F.3d 432, 437-38 (6th Cir.1993) (agreeing with a BIA determination that an alien's conviction for making false statements on a driver's license application, in violation of Michigan statute, involved moral turpitude because an element of the crime required the alien to "knowingly make a false statement or knowingly conceal a material fact," which amounted to fraud). Thus, we find that the applicant's conviction N.J.S.A. §2C:21-3b is a crime involving moral turpitude.

The AAO notes that the applicant is not eligible for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act because the applicant was convicted of more than one crime involving moral turpitude.

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 –

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent

residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

A 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, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse, U.S. citizen child, U.S. citizen stepchild, lawful permanent resident child, and lawful permanent resident father are the qualifying relatives in this case. 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. *Salcido-Salcido v. I.N.S.*, 138 F.3d 1292 (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.

We find that the applicant’s U.S. citizen spouse will suffer extreme hardship as a result of separation and a result of relocation. The applicant’s spouse is claiming that she will suffer extreme financial and emotional hardship as a result of separation. Financial documentation in the record indicates that the applicant and his spouse earn approximately \$60,000 per year in net income with the applicant earning a little over 50% of this income. Statements from the applicant’s stepson and a psychological evaluation reflect that the applicant’s spouse will suffer significant emotional hardship as a result of separation. The record indicates that the applicant’s spouse has suffered significant trauma and loss in her life, including recently losing two sisters to cancer. The applicant’s spouse reports and the psychological evaluation corroborates that she is depressed and anxious at the possibility of losing the emotional support of the applicant. She also reports that she is experiencing insomnia, loss of concentration at work and school, and loss of appetite due to the stress and anxiety she is experiencing as a result of the applicant’s immigration situation.

The applicant’s spouse claims that she cannot relocate to Colombia because she would not want to leave her 18-year-old son from a prior relationship, who is in high school and still lives with her, nor would she want to leave her 76-year-old mother who relies on her care. The applicant’s spouse was born in the United States and expresses concern over the economic and safety situation in Colombia. We note that the U.S. State Department has recently issued a travel warning for Colombia, dated April 11, 2013. The warning states that U.S. citizens traveling to

Colombia are strongly encouraged to exercise caution and remain vigilant as terrorist and criminal activities remain a threat throughout the country. The warning states that explosions occur throughout Colombia on a regular basis, including some in Bogota and that small towns and rural areas of Colombia can still be extremely dangerous due to the presence of terrorists and narco-traffickers, including armed criminal gangs that are active throughout much of the country. The warning states that violence associated with these criminal gangs has spilled over into many of Colombia's major cities and that these groups are heavily involved in the drug trade. The warning goes on to state that kidnapping continues to be a risk in Colombia and that U.S. government officials and their families are normally only permitted to travel to major cities by air and do not travel by road outside urban areas at night. Thus, we find that the applicant's spouse's concerns regarding conditions in Colombia are not unfounded. We also find that due to the applicant's strong family and financial ties to the United States, as well as the conditions in Colombia that the applicant's spouse would suffer extreme hardship upon relocation.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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). The BIA has stated:

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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 convictions for shoplifting and filing of false information, the applicant's unlawful residence in the United States, and the applicant's unauthorized employment in the United States. The favorable factors in the present case are the applicant's significant family ties to the United States; the extreme hardship to the applicant's U.S. citizen wife and hardship to his children if he were to be denied a waiver of inadmissibility; the applicant's lack of a criminal record or offense since 2006; his role as a supportive father and husband; and, according to a letter from the applicant's employer, his attributes as a reliable and hard-working employee.

The AAO finds that the crimes committed by the applicant are serious in nature and 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. Accordingly, the appeal will be sustained.

In proceedings for an 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. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.