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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
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Washington, DC 20529-2090

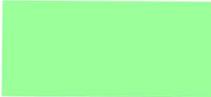


U.S. Citizenship
and Immigration
Services



Date: **MAY 31 2013**

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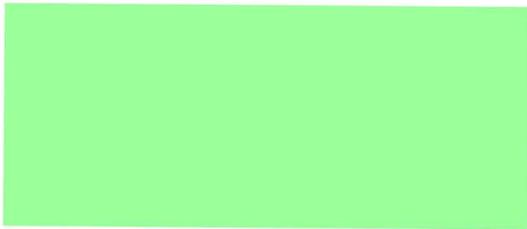
FILE: 

IN RE:

Applicant: 

APPLICATION: Application for Waiver of Grounds 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.

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, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Argentina 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 (Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is the husband of a U.S. citizen. On April 10, 2010, he filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). The applicant seeks a waiver of inadmissibility under 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 wife and children.

In a decision dated October 13, 2010, the field office director concluded that the applicant failed to establish that his qualifying relatives would experience extreme hardship as a consequence of his inadmissibility and denied the Form I-601 waiver application accordingly.

On appeal, counsel asserts that the director erred in finding that the applicant has not established extreme hardship to his qualifying relatives, as the evidence outlining emotional, psychological and financial difficulties demonstrates extreme hardship to the applicant's spouse and children.

The record includes, but is not limited to: counsel's brief; the applicant's declaration; the applicant's wife's statement; copy of a marriage certificate; copies of naturalization certificates; copies of income tax records and other financial documentation; immunization records; copy of petition for the determination of child custody, visitation and support; birth certificates; copy of a divorce decree; and documentation regarding the applicant's criminal history.

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

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

(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 Board of Immigration Appeals (Board) 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 Eleventh Circuit has found that, when evaluating whether an offense constitutes a crime involving moral turpitude, immigration adjudicators must employ the categorical and modified categorical approach. *Fajardo v. U.S. Att'y 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 record shows that on September 28, 2007, the applicant was convicted in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, of “use of scanning device to defraud” in violation of section 817.625(2)(a) of the Florida Statutes. The applicant was placed on probation for a period of three years and was ordered to pay court costs and fees. The field office director found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Florida Statutes § 817.625(2)(a) provides that:

It is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, for a person to use:

1. A scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card without the permission of the authorized user of the payment card and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.
2. A reencoder to place information encoded on the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card without the permission of the authorized user of the card from which the information is being reencoded and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.

All offenses under Florida Statutes § 817.625(2)(a) require an “intent to defraud.” Crimes that include as a requirement an intent to defraud have been held, as a general rule, to involve moral turpitude. *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992). The U.S. Supreme Court in *Jordan v. De George* concluded:

Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.”

341 U.S. 223, 232 (1951). Therefore, there is ample support that all convictions under Florida Statutes § 817.625(2)(a) categorically constitute crimes involving moral turpitude. Accordingly, the applicant’s conviction under section 817.625(2)(a) of the Florida Statute renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and he requires a discretionary waiver under section 212(h) of the Act.

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

(h) The Attorney General [Secretary of Homeland Security] may, in [her] discretion, waive the application of subparagraph (A)(i)(I) . . . 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 section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The applicant’s wife and children are the qualifying relatives in these proceedings. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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. The AAO now turns to the issue of whether the applicant has established that a qualifying relative would experience extreme hardship as a result of his inadmissibility.

With regards to remaining in the United States without the applicant, in a declaration dated November 5, 2010, the applicant's wife indicates that she depends upon the applicant for emotional support and in him helping to raise and take care of her daughter from a prior relationship. The applicant's wife asserts that her daughter's biological father abandoned her when she was six months pregnant, and that the applicant has assumed the role of her father by caring for her as if she were his own daughter. In a declaration dated November 5, 2010, the applicant corroborated his wife's assertions and states that he attends her stepdaughter's school events, takes her to doctor's appointments, and cares for her while his wife is at work; and that separation would break the bond her stepdaughter has developed with him and his son from a prior relationship. We further note that counsel conveys that the applicant's wife and stepdaughter have a close relationship with the applicant, and they will experience emotional hardship if separated from him. Besides emotional hardship, counsel conveys that the applicant's wife and son will endure financial difficulties if the applicant returns to Argentina and separates from them, as he presently provides child supports to his son from a prior relationship and financially contributes to their household on his income of \$29,506. Moreover, the applicant's wife states that she would be unable to visit the applicant in Argentina with her daughter as she will be unable to afford it on her yearly salary of \$18,017.

The applicant indicates that his son would also experience extreme hardship if he is denied admission and is forced to return to Argentina. The applicant indicates, and the record evidence establishes, that he shares custody of his son with the child's mother, that the child's mother is a victim of domestic violence in her current relationship, and that he has been his child's source of emotional support during this time. The applicant indicates that his son has witnessed his mother hurt by domestic violence, that his son has experienced emotional disturbances as a result of the situations between his mother and stepfather, and that the prospect of separation from the applicant would be devastating to his son. Counsel submitted evidence on appeal in the form of police reports, rap sheets, and case summaries establishing that the mother of the applicant's son has been a victim of domestic violence and that the altercations have occurred at their home.

The alleged hardships to the applicant's wife and children if they remain in the United States without the applicant are both emotional and financial in nature. The applicant's wife asserts, and the evidence before the AAO demonstrates, that the applicant's wife and children have a close relationship with the applicant. We note that the record reflects that the applicant has been married to his wife since February of 2009. In view of the significant affect that the record establishes that separation from the applicant will have on the applicant's wife and children, as well as the applicant's financial obligations and shared custody over his son from a prior relationship, who attends counseling and resides with the applicant on the weekends, we find the applicant has demonstrated that separation will result in extreme hardship to his wife and children.

With regard to relocation to Argentina, the applicant's wife avers in a statement dated November 5, 2010, of living in the United States since she was two years old, and that her immediate family also resides in Miami, Florida. Moreover, the applicant's wife conveys that she was able to obtain an education in this country and that she works as a foreclosure processor. We note that the applicant was born in Uruguay and the record does not establish family or community ties to Argentina. Moreover, the applicant indicates that his children will experience the hardship of not knowing the Spanish language, not having the educational opportunities and resources equal to what they have in

the United States, and the difficulties in them having to adapt to life in a country with different customs. Furthermore, we note that the applicant's son relocation would likely require the applicant to either: separate from his mother, seek a new custody agreement, or violate the terms of the custody agreement as it relates to the biological mother as she is the primary residential parent.

The record evidence also suggests that relocation would be difficult for the applicant's son given his emotional struggles, his need for school counseling, and his medical conditions. The Board and U.S. Courts decisions have found extreme hardship in cases where the language limitations of the children impeded an adequate transition to daily life in the applicant's country of origin. In *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the Board concluded that the language abilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style, and the Board found that uprooting her at that stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit Court of Appeals found the Board abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

When the hardship factors to the applicant's wife and children are considered collectively, the AAO finds they demonstrate that they will experience extreme hardship if they join the applicant to live in Argentina.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

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).

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 criminal convictions for theft. The favorable factors are the extreme hardship to the applicant’s wife and children, and the statements by the applicant’s wife, his successful completion of probation, and the evidence of rehabilitation. In his statement dated November 5, 2010, the applicant indicates that his probation was reduced to two years for good conduct, that he regrets the incident that led to his conviction, and that he wishes he could take back his wrongful actions. The applicant shows remorse for his past criminal conduct in his statement, and indicates that it served as a growing and learning experience for him. In addition, five years have passed since the applicant committed the offenses rendering him inadmissible. The record reflects that the applicant successfully completed probation and that there are no other arrests or convictions since his 2007 crime. The AAO finds that the crimes committed by the applicant are serious in nature; nevertheless, when taken together, we find 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 proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the applicant’s appeal is sustained.

ORDER: The appeal is sustained.