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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: NOV 0 6 2013 Office: MIAMI FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h), of the Immigration and Nationality Act.

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Michael Rosenberg

Ron Rosenberg
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 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 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 lawful permanent resident mother and father.

In a decision, dated April 3, 2013, the field office director found the applicant inadmissible for having been convicted of grand theft. In his decision, the field office director acknowledged the strong financial and emotional bonds the applicant shares with his parents, but then stated that hardship upon separation is moot because there are no deportations to Cuba. He did not address hardship upon possible relocation to Cuba and concluded that the applicant did not establish extreme hardship to a qualifying relative as a result of his inadmissibility. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated April 19, 2013, counsel states that the applicant's plea in the Miami-Dade Circuit Court does not constitute a conviction for immigration purposes because no sentence was "actually imposed" after the criminal court suspended the imposition of his sentence. Counsel cites to *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995), in support these statements. He also states that the applicant's mother and father are completely dependent on the applicant financially and would suffer extreme hardship in his absence.

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 –
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> (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 record indicates that on January 20, 2010 the applicant was arrested and charged with grand theft in the third degree under Florida Statutes § 812.014. On March 11, 2011 he entered a plea of guilty to this charge, adjudication was withheld, and he was sentenced to one day probation. The AAO notes that third degree felonies in Florida are punishable for up to 5 years in prison.

In his brief, counsel states that the applicant was not convicted for immigration purposes because the court suspended the imposition of his sentence. In support of these statements counsel submits court documentation showing that the applicant was sentenced to one day probation and that court costs of $603 were imposed. This documentation also indicates that the "cost of supervision" was waived and that the execution of his sentenced was stayed. Counsel cites to *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995) to support his statements regarding the applicant's conviction not constituting a conviction for immigration purposes because no sentence was "actually imposed" after the criminal court suspended the imposition of his sentence. Even if counsel's interpretation of *Esposito* and the facts in the applicant's case are correct, we find that *Esposito* has been superseded by the enactment

of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. This Act defines a conviction for immigration purposes under section 101(a)(48) as follows:

> (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-
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> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
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> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.
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> (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

Thus, the suspension of the imposition of the applicant's sentence is of no consequence to his conviction for immigration purposes and we find that the applicant has been convicted as defined by the Act in section 101(a)(48). We now turn to whether the applicant's conviction was for a crime involving moral turpitude.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has reaffirmed the traditional categorical and modified categorical approach for determining whether a crime involves moral turpitude, declining to follow the framework set forth by the Attorney General in *Matter of Silva-Trevino,* 24 I&N Dec. 24 I&N Dec. 687 (A.G. 2008). *See Fajardo v. Attorney General*, 659 F.3d 1301, 1310 (11th Cir. 2011). In rejecting the Attorney General's approach in *Silva-Trevino*, the Eleventh Circuit found that section 212(a)(2)(A)(i)(I) of the Act unambiguously requires courts to apply only the categorical and modified categorical approaches, which do not permit an evaluation of

information outside the record of conviction, in determining whether a crime involves moral turpitude. *Id.* at 1307-08; *see also Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) ("[T]he determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicating a particular conviction.").

The Eleventh Circuit defines the categorical approach as "looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *see also Itani v. Ashcroft*, 298 F.3d 1213, 1215-16 (11th Cir. 2002) ("Whether a crime involves . . . moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct."); *Sosa-Martinez v. U.S. Att'y Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2004) ("[W]e must determine whether an . . . offense . . . is a crime involving moral turpitude without reference to the facts underlying [the] conviction.")However, where the statute under which an alien was convicted is "'divisible'—that is, it contains some offenses that are [crimes involving moral turpitude] and others that are not[,] . . . the fact of conviction and the statutory language alone are insufficient to establish . . . under which subpart [the alien] was convicted." *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005). Under such circumstances, "the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." *Fajardo*, 659 F.3d at 1305 (citing *Jaggernauth*, 432 F.3d at 1354-55).

At the time of the applicant's conviction, Fl. Stat. § 812.014 provided, in pertinent parts:

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

In the instant case, the statute under which the applicant was convicted, Fl. Stat. § 812.014, involves both temporary and permanent takings. A plain reading of Fl. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). Therefore, the AAO cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, we will apply the modified categorical approach. The complaint in connection with

the applicant's arrest indicates that the applicant was caught with stolen gift cards from a retail store. In *Matter of Jurado*, 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. Therefore, the AAO finds that the applicant was convicted under the part of the statute pertaining to permanent takings, and has thus been convicted of at least one crime involving moral turpitude: grand theft under Fl. Stat. § 812.014.

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 –
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> . . . .
>
> (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 parents 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-Moralez*, 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.

The record of hardship includes two briefs from counsel, financial documentation, a psychological evaluation for the applicant's mother, and a statement from the applicant's mother.

The applicant asserts that his mother will suffer extreme emotional and financial hardship as a result of his inadmissibility. Counsel states that the applicant's parents are wholly dependent on the applicant for financial support because they are unable to work. The record indicates that the applicant's mother, who has a history of suffering from depressive symptoms, has been diagnosed with Major Depressive Disorder as a result of the uncertainty of her son's situation. The psychological evaluation indicates that she is anxious, has impaired concentration, and has had suicidal ideations. The doctor performing the evaluation recommended the applicant's mother undergo regular follow-up treatment to decrease her depressive symptoms, but the record fails to include any documentation regarding the applicant's mother course of treatment and whether her symptoms have improved as a result. In regards to the assertions involving financial hardship, the record does not show that the applicant's parents are wholly supported by the applicant or that they would suffer extreme financial hardship in his absence. The record includes tax documentation that indicates the applicant did not claim his parents as dependents, although the record states he lives with them and provides for all of their needs. Tax documentation in the record from 2010 indicates

that the applicant's mother earned an income of almost $28,000 dollars during the tax year. Thus, we find that the current record fails to show that the applicant's mother and/or father will suffer extreme hardship as a result of the applicant's inadmissibility.

Even assuming the United States would not remove the applicant to Cuba, this fact alone does not necessarily preclude or render impossible relocation to that country by the applicant and his family members, and we therefore consider the scenario of relocation in our hardship analysis. However, counsel does not assert that the applicant or his parents intend to relocate if his application is denied, and the applicant has provided no details or information regarding any hardship the applicant's parents would face if they were to relocate to Cuba.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, 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 lawful permanent resident father or mother as required under section 212(h) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

When a determination on discretion is warranted, we note that the applicant's criminal record is significant and should be considered on discretion. Specifically, the applicant has a record of three arrests and one incident where he and another man led the Coast Guard on a two hour high speed chase in international waters nine miles of Cuba's territorial waters. A Coast Guard officer gave sworn testimony in court that he suspected the applicant was involved in alien smuggling given the nature and intensity of the chase, but ultimately no charges were filed.

In proceedings for application for 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.