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



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: DEC 17 2014

OFFICE: HARTFORD, CT

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 (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.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Hartford, Connecticut and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The applicant is a native and citizen of Brazil who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. In a decision, dated June 3, 2014, the field office director concluded that the applicant failed to establish extreme hardship would be imposed upon a qualifying relative as a result of his inadmissibility. The field office director also found that even if the applicant had established extreme hardship to his U.S. citizen wife and/or newborn son as a result of his inadmissibility, a favorable exercise of discretion would not be warranted given the negative factors in the applicant's case. The waiver application was denied accordingly.

On appeal, counsel submits additional evidence of hardship to the applicant's U.S. citizen spouse and documentation that the applicant warrants a favorable exercise of discretion.

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

- (i) ... 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, ... is inadmissible.

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

[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 assessing whether a conviction is a crime involving moral turpitude, the adjudicator must first "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). The adjudicator engages in a categorical inquiry, considering the "inherent nature of the

crime as defined by statute and interpreted by the courts,” not the underlying facts of the criminal offense. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); see also *Matter of Louissant*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). If the statute “defines a crime in which turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude.” *Matter of Short*, *supra*, at 137.

Where the statute includes some offenses involving moral turpitude and some which do not – where there is a *realistic probability* that the statute would be applied to conduct not involving moral turpitude – the adjudicator looks to the record of conviction to determine the offense for which the applicant was convicted. See *Matter of Guevara Alfaro*, 25 I&N Dec. 417, 421 (citing *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689-90, 696-99 (A.G. 2008)); see also *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability, as opposed to a theoretical possibility, exists where there is an actual prior case, possibly the applicant’s own case, in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. *Matter of Silva-Trevino*, *supra*, at 708. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Matter of Louissant*, *supra*, at 757; see also *Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”)

If review of the record of conviction is inconclusive, an adjudicator may consider “probative evidence beyond the record of conviction” to resolve whether the offense constitutes a crime involving moral turpitude. *Matter of Guevara Alfaro*, *supra*, at 422 (citing *Matter of Silva-Trevino*, *supra*, at 690, 699-704, 709). However, 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.” *Matter of Silva-Trevino*, *supra*, at 703; see also *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 468 (BIA 2011) (An adjudicator may not “undermine plea agreements by going behind a conviction to use sources outside the record of conviction to determine that an alien was convicted of a more serious turpitudinous offense.”).

The record shows that on [REDACTED] 2004, the applicant was convicted of Conspiracy to Commit Larceny in violation of Connecticut General Statutes (C.G.S) § 53a-48/53a-124. The applicant was sentenced to one year in prison with execution suspended and 18 months probation. The applicant violated his probation, which was then revoked, and the applicant was sentenced to six months in prison. The applicant was 23 years old at the time of this conviction.

At the times of the applicant’s conviction, C.G.S § 53a-124 stated, in pertinent part:

- (a) A person is guilty of larceny in the third degree when he commits larceny, as defined in section 53a-119, and:
 - (1) The property consists of a motor vehicle, the value of which is five thousand dollars or less;
 - (2) the value of the property or service exceeds one thousand dollars;
 - (3) the property consists of a public record, writing or instrument kept, held or deposited according to law with or in the keeping of any public office or public servant; or
 - (4) the property consists of a

sample, culture, microorganism, specimen, record, recording, document, drawing or any other article, material, device or substance which constitutes, represents, evidences, reflects or records a secret scientific or technical process, invention or formula or any phase or part thereof. A process, invention or formula is "secret" when it is not, and is not intended to be, available to anyone other than the owner thereof or selected persons having access thereto for limited purposes with his consent, and when it accords or may accord the owner an advantage over competitors or other persons who do not have knowledge or the benefit thereof.

At the times of the applicant's conviction, C.G.S § 53a-119 stated, in pertinent part:

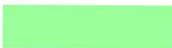
A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner....

At the times of the applicant's conviction, C.G.S § 53a-4 stated:

(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

It is well settled that a conspiracy to commit a certain crime involves moral turpitude if the underlying crime involves moral turpitude. *See Matter of P-*, 5 I. & N. Dec. 444, 446 (BIA 1953). Generally, the crime of theft or larceny, whether grand or petty, involves moral turpitude. *Matter of Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974). The common law definition of larceny is a wrongful taking and carrying away of the personal property of someone else with the intent to permanently deprive the owner of that property. *See Matter of V-Z-S-*, 22 I&N Dec. 1338, 1346 (BIA 2000). The Model Penal Code defines theft as the unlawful taking of, or the unlawful exercise of control over, movable property of another with the intent to deprive him thereof. *Id.* at 1343; *see also* Model Penal Code § 223.2(1) (1980). The Board of Immigration Appeals has stated that under the common law, larceny is distinguishable from theft in that larceny includes all takings with a criminal intent to permanently deprive the owner of the rights and benefits of ownership. *Matter of V-Z-S-*, 22 I&N Dec. at 1345-46. By contrast, the Board has noted that theft statutes may encompass both temporary and permanent takings, and that a theft crime involves moral turpitude "only when a permanent taking is intended." *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973).

The elements to be proven for a conviction of larceny under C.G.S § 53a-119 are: (1) the wrongful taking or carrying away of the personal property of another, (2) the existence of a felonious intent in the taker to deprive the owner of it permanently, and (3) the lack of consent of the owner. *State v. Kimber* (1998) 709 A.2d 570, 48 Conn.App. 234, appeal denied 719 A.2d 1164, 245 Conn. 902. Thus, for the applicant to be convicted of larceny in Connecticut it must have been proven, beyond a reasonable doubt, that the applicant intended to deprive the owner of his or her property



permanently. Therefore, the applicant was convicted of a crime involving moral turpitude and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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

Section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relative that qualifies is the applicant's spouse. Hardship to the applicant is considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an 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. See *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: a statement from the applicant, a statement from the applicant’s spouse, a letter from a psychoanalyst who is treating the applicant’s spouse, a letter from the guidance counselor at the applicant’s spouse’s high school, a letter from the applicant’s sister, country conditions information, financial documentation, and numerous letters regarding the applicant’s contributions to his community.

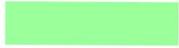
The record establishes that the applicant’s spouse and child will suffer extreme hardship as a result of the applicant’s inadmissibility. The applicant’s spouse, who is 19 years old, and the applicant’s son, who is seven months old, would suffer extreme financial and emotional hardship as a result of separation. The applicant’s spouse is a recent high school graduate and in 2012, the last year on record showing any income for the applicant’s spouse, she made \$1,564. In contrast, in 2013, the applicant earned \$55,335. The record establishes that the applicant’s spouse came to the United States approximately 3 years ago. She is from the Dominican Republic. Her mother stayed in the Dominican Republic and the applicant’s spouse was sent to live in Massachusetts with her abusive

father. The applicant's spouse states that she fled from her father, seeking protection from a friend in Connecticut and she soon met the applicant. The record indicates that if the applicant, his spouse, and his child were separated it would be devastating to the family. The applicant's spouse would have no way to support their child, nor would she be willing to go back to her abusive father. The record contains a letter from a psychoanalyst treating the applicant's spouse. He states that he sees the applicant's spouse 1 to 2 times per week, that she suffers from anxiety and depression, and that there is a risk of suicide if her situation worsens. Moreover, numerous statements in the record indicate that the applicant is not only his spouse and child's sole source of financial support, but he is also their only source of emotional support and encouragement.

The record also establishes that the applicant's spouse and child would suffer extreme hardship as a result of relocation. The applicant's spouse has never lived in Brazil and does not speak Portuguese. The record indicates that the applicant and his spouse do not want to relocate to Brazil because of the health care, crime, and violence in Brazil, as well as their inability to find employment in Brazil. The record establishes that the applicant's spouse is undergoing mental health counseling, which would be difficult to continue in Brazil where she does not know the language. The record also indicates that the applicant is disabled in his right hand and would be limited by the types of employment he could do in Brazil, further restricting his ability to earn a living. In addition, the record states that the applicant cannot rely on family if he returned to Brazil. The record includes a letter from the applicant's sister. This sister states that the applicant would not be able to find a job in the part of Brazil where she lives and that he would not be able to rely on their mother because the applicant has not seen her since 2003, when she attempted to kill him with a knife. The applicant's father is dead and the applicant is not communicating with his other sisters. Thus, the applicant's spouse would suffer extreme financial and emotional hardship as a result of relocating to Brazil where she does not know the language, where she will have difficulty continuing her mental health therapy, where they have no familial support, and where the applicant and/or his spouse will have difficulty in finding employment. Considering all of the factors in the applicant's case in the aggregate, the applicant has established that his spouse would face extreme hardship if his waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

Matter of Marin, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:



We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. See, e.g., *Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

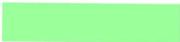
In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in the applicant's case include: hardship to the applicant's spouse and child if the applicant's waiver application were denied, no other criminal convictions since 2004, and



significant documentation in the record showing that the applicant has been fully rehabilitated from his criminal past and is a valued member of his community. The record includes letters establishing that the applicant is valued by his employer, involved in numerous volunteer opportunities and charities in his community, and is working his way through school to become a nurse. The record includes documentation showing that the applicant was given an award by his local police station for helping to apprehend perpetrators of an assault in his neighborhood. Finally, the record includes numerous letters written on the applicant's behalf attesting to his attributes as a loving, caring, and attentive father and husband.

The unfavorable factors in the applicant's case include his criminal conviction and unauthorized residence and employment in the United States.

Although the applicant's criminal conviction and immigration violations are serious, the record establishes that the positive factors in this case outweigh the negative factors and a favorable exercise of discretion is warranted. The burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.