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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: FEB 2 0 2014 Office: NEW YORK [redacted]

IN RE: Applicant: [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. 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica who was found inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her U.S. citizen spouse and her U.S. citizen children.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director* dated February 15, 2013.

On appeal, counsel contends that the documentation and evidence previously provided with the Form I-601 is sufficient to establish extreme hardship to a qualifying relative. Additionally, the District Director did not analyze the hardships to the applicant's children, disregarded positive equities, and did not explain why the evidence was insufficient to show hardship to the applicant's qualifying relatives. Counsel further asserts that the District Director's decision was flawed by including, "as the basis of her decision," a Georgia arrest that was dismissed for failure to prosecute. *See Affirmation in Support of Appeal*, dated March 14, 2013.

The record includes, but is not limited to: a brief by applicant's counsel in support of Form I-290B, Notice of Appeal or Motion; a letter from counsel in support of the applicant's Form I-601; a statement from the applicant's spouse; a psychiatric report for the applicant's spouse; medical documentation for the applicant's son; financial documentation; and the applicant's criminal records. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (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-
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> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of 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 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 Louissaint*, 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, not a theoretical possibility*, 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. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 698 (A.G. 2008) (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where there is an actual prior case, possibly the applicant's own criminal 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.")

The record shows that the applicant has multiple arrests and convictions. The applicant was first convicted on December 20, 2004 in the Criminal Court of the C for Petit Larceny under New York Penal Law § 155.25, following an arrest on May 2, 2004. For this conviction the applicant was sentenced to a conditional discharge after one year, a fine of $300, and community service of 25 hours. The applicant was next convicted in the County Court for County, Florida, on April 4, 2005, of Petit Theft, in violation of § 812.014(3)(A) of the Florida Statutes. She was ordered to pay court costs and to enter a shoplifters program within 60 days. The applicant was then convicted in the Criminal Court of the City of New York on August 1, 2006, for Petit Larceny, under New York Penal Law § 155.25, and was sentenced to a conditional discharge of one year and community service for three days.

New York Penal Law § 155.25 states, "[a] person is guilty of petit larceny when he steals property. Petit larceny is a class A misdemeanor." New York Penal Law § 155.05 states, in pertinent part:

> (1) A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

Under New York Penal Law § 155.00, the term "deprive" means "(a) to withhold [property] or cause it to be withheld from [another] permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property."

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."). The AAO notes that although the statute does not make a clear distinction as to whether a conviction under this section of the statute constitutes a permanent or temporary taking, New York courts have found that to establish larcenous intent, a permanent taking must be intended. New York courts have also indicated that larcenous intent is shown when the defendant intends to exercise control over another's property for so an extended period or under such circumstances as to acquire the major portion of its economic value or benefit. See *People v. Jennings*, 69 N.Y.2d 103, 118-122, 504 N.E.2d 1079, 1086-89 (N.Y. 1986). In *People v. Hoyt*, 92 A.D.2d 1079, 461 N.Y.S.2d 569, 570 (N.Y. App. Div. 3rd Dept. 1983) the court found that to warrant a larceny conviction, intent to permanently deprive the owner of his property must be established and that a temporary withholding of property, by itself, would not constitute larcenous intent.

In *Ponnapula v. Spitzer*, the Second Circuit Court of Appeals found that the acts covered by New

York Penal Law § 155.00 are permanent takings that manifest larcenous intent. 297 F.3d 172, 183-84 (2nd Cir. 2002). The court observed that while the intent to temporary deprive an owner of property does not constitute larcenous intent, such a temporary deprivation occurs only where a person borrows property without permission with the intent to return the property in full to the owner after a short and discrete period of time. *Id.* at 84. Thus, the AAO finds that the applicant's conviction for Petit Larceny under New York Penal Law § 155.25 required the intent to permanently take another person's property and is thus a conviction for a crime involving moral turpitude.

The applicant was convicted under New York Penal Law § 155.25 on two separate occasions. As such, the applicant is inadmissible under INA § 212(a)(2)(A)(i)(I) of the Act. Therefore, it is not necessary to determine whether her conviction for Petit Theft under Florida Statutes § 812.014 also qualifies as a crime involving moral turpitude, as the applicant is clearly inadmissible for her convictions in New York. The applicant does not dispute that her convictions are for crimes involving moral turpitude.

The applicant was also arrested on July 29, 2010 in , for Aggravated Assault, Battery, and Criminal Damage to Property, Second Degree. These charges were dismissed under a nolle prosequi order due to insufficient evidence. On appeal, counsel contends that the District Director improperly included this arrest in her decision, as the case was dismissed. The AAO concurs with counsel that this particular arrest cannot support finding the applicant inadmissible under Section 212(a)(2)(A)(i) of the Act. However, the District Director, in part of her decision, refers only to the applicant's crimes of 2004, 2005, and 2006, omitting the 2010 arrest. Moreover, a request for additional evidence dated August 17, 2012, indicates that the applicant requires a waiver because of her crimes of 2004, 2005, and 2006, but not 2010. Therefore, the AAO finds that the director's reference to the 2010 arrest, while inappropriate, was not considered in finding the applicant inadmissible under Section 212(a)(2)(A)(i) of the Act.

As the applicant has not disputed on appeal that her convictions are for crimes involving moral turpitude, and the record does not show the finding of inadmissibility to be erroneous, we will therefore not disturb the finding of the District Director that the applicant is inadmissible under Section 212(a)(2)(A)(i) of the Act.

As a person found to be inadmissible under section 212(a)(2)(A) of the Act, the applicant is eligible to apply for a waiver under section 212(h) of the Act.

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

> (h) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in [his] discretion, waive the application of subparagraphs (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 established to the

> satisfaction of the [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 imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. The applicant's U.S. citizen spouse and children are qualifying relatives in this case. Hardship the alien experiences upon removal is irrelevant to section 212(h) waiver proceedings and will be 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.

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. INS*, 138 F.3d 1292, 1293 (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.

On appeal, the applicant does not submit additional evidence of hardship to her qualifying relatives. Counsel contends that the documentation and evidence previously provided with the Form I-601 is sufficient to establish extreme hardship to a qualifying relative. Therefore, this decision is based on reviewing the evidence that was previously submitted.

Concerning the hardship he would experience if he remains in the United States without the applicant, the applicant's spouse states that he will experience financial hardship if the applicant's waiver is not approved, adding that he will not be able to support their family financially. The applicant's spouse states that he is employed in sales with an annual salary of $20,000, and that the family mainly relies upon income from the applicant's business, a beauty salon. Financial documentation in the record includes a copy of the 2011 federal income tax return for the applicant and her spouse, indicating that the applicant's spouse earned $21,857, and the applicant earned $29,200 from her business. The record, however, contains no evidence regarding the assets and liabilities of the applicant's spouse or other evidence to support concluding that her spouse is unable to meet his financial obligations in the applicant's absence.

The applicant's spouse also states that he has been devastated by the thought of the applicant's removal from the United States. The record includes a report of a psychologist who tested the applicant's spouse and found his scores show he is severely depressed and severely anxious. The psychologist diagnosed him with major depressive disorder, with depressed mood, weight gain, insomnia, diminished ability to think or concentrate, and fatigue or loss of energy. However, the psychological report lacks details concerning treatment recommendations and his response to any counseling or medical treatments he may have received. Although the AAO is sympathetic to the family's circumstances and recognizes that the input of any health professional is respected and valuable, the record does not show that the psychological hardship to the applicant's spouse, and the symptoms he has experienced, are unique compared to others separated from a spouse.

Counsel asserts that the applicant's children will experience extreme hardship if they remain in the United States without her. The applicant's spouse states that their son suffers from asthma, a

condition that is extremely severe leading to frequent seizures and emergency hospital visits. The record includes medical documentation concerning the asthma condition of their son, who was born on August 15, 2009, indicating that he has received medical treatment at hospitals on at least nine occasions since his birth. However, there is insufficient evidence in the record to establish that the applicant's spouse would be unable to arrange for their son to receive appropriate medical care.

Counsel states in his letter in support of the Form I-601 that the applicant's daughter from a previous relationship suffers from trauma caused by the death of her father, a popular dancer and entertainer in Jamaica who was murdered in 2005. This incident is briefly mentioned in the applicant's spouse's psychological report. However, the report lacks detail about the applicant's daughter's condition, and no other independent evidence in the record shows that the applicant's daughter currently is experiencing emotional hardship or other difficulties.

The AAO recognizes that the applicant's spouse and children will endure hardship as a result of separation from the applicant. However, their situation if they remain in the United States is typical to individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record. The difficulties that the applicant's spouse and children face as a result of separation from the applicant, even when considered in the aggregate, do not rise to the level of extreme as contemplated by statute and case law.

The applicant's spouse states that he would suffer hardship if he were to relocate to Jamaica to reside with the applicant, as he was born and raised in the United States, has never lived outside the United States, has no relatives and friends in Jamaica, and is unfamiliar with its culture. In addition, the applicant's spouse has a child from another relationship in the United States who he would not be able to see frequently.

The applicant's spouse also asserts that unemployment in high in Jamaica, and it would be difficult for him to obtain gainful employment. However, the applicant's spouse does not submit evidence in support of this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

With respect to the hardship their children would experience if they were to relocate to Jamaica, the applicant's spouse states it would be difficult for their son to reside in Jamaica due to his asthma, the poor air quality in Jamaica, and its subpar medical care. However, the applicant submits no evidence to corroborate his statements. Moreover, though the psychologist's report includes a statement by the applicant's daughter that she could not live in Jamaica, the record lacks details concerning the extent of her emotional hardship and any potential treatment available for her there.

Based on the evidence on the record, the applicant has not established that her spouse and children would suffer hardship beyond the common results of removal if they were to relocate to Jamaica to reside with the applicant. The hardships asserted by counsel, the applicant, and her spouse if the applicant were to relocate to Jamaica are not supported by evidence. The record includes no employment reports or other documentation concerning work prospects for her spouse, or

corroborating information about the availability of suitable medical services for her son. Considering the evidence of hardship in the aggregate, the hardship her spouse and children would experience upon relocation does not rise to the level of extreme as contemplated by statute and case law.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse and children will face extreme hardship if the applicant is unable to reside in the United States. Rather, the record demonstrates that they will face no greater hardship than the unfortunate, but expected disruptions, inconveniences, and difficulties arising whenever a loved one is removed from the United States or refused admission. Although the AAO is not insensitive to the situation of the applicant's spouse and children, the record does not establish that the hardship they face rises to the level of "extreme" as contemplated by statute and case law.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.