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

Date: JUL 25 2014 Office: OAKLAND PARK, FL FILE:

IN RE: Applicant:

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:

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 Field Office Director, Oakland Park, 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 Peru. The director found that the applicant was 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 committing a crime involving moral turpitude (CIMT). The applicant is seeking a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).[1]

The Field Office Director denied the waiver application as a matter of discretion because the applicant has been convicted of three crimes since entering the United States.

On appeal, counsel for the applicant asserts that the Field Office Director ignored substantial facts and evidence in the record regarding hardship to the applicant's children and relied on improper precedent cases. Counsel further asserts that the record contains sufficient evidence to establish extreme hardship to a qualifying relative.

The record contains, but is not limited to, the following documents: a brief from counsel; statements from family members and friends of the applicant and his spouse; statements from the applicant and his spouse; court records pertaining to the applicant's convictions; background materials on the country conditions in Peru; medical records related to the applicant's health conditions; tax returns , pay stubs and other financial records for the applicant, his spouse and their automotive repair business in Florida, copies of financial documents; and documents filed in relation to the applicant's removal proceedings.

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

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

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[1] The applicant's underlying I-485 adjustment application was previously denied by the Field Office Director and a notice of intent to revoke the applicant's I-130 was issued to the applicant based on the fact that his divorce from his prior spouse was not legal. The applicant filed a motion to have the I-485, I-130 and Form I-601 re-opened as the basis of the I-130 and I-485 revocation and denial had been corrected. The Field Office Director issued a notice re-opening the applicant's adjustment and waiver proceedings and issued a decision on August 31, 2013.

> [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 *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General, clarified that for a crime to qualify as a crime involving moral turpitude for purposes of the INA, it "must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness."

The record reflects that the applicant was convicted of Petit Larceny, in violation of section 155.25 of the New York Penal Code, on 1999, County, New York; the record also reflects the applicant was convicted of Petit Larceny under the same provision in County, New York, 2001; and the record reflects that the applicant convicted under the same section of the New York Penal Code, Petit Larceny, in New York, or 2004. The applicant does not contest that he has been convicted of Crimes Involving Moral Turpitude.

The Second Circuit Court of Appeals in *Ponnapula v. Spitzer* found that the acts covered by section 155.00 of the New York Penal Code are permanent takings that manifest larcenous intent. 297 F.3d 172, 183-84 (2d Cir. 2002). The Second Circuit observed that while the intent to temporarily 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 owner's property in full after a short and discrete period of time." *Id.* at 184. Thus, for a defendant to be convicted of any crime involving larceny under the New York Penal Code, it must have been established that he or she intended to permanently take another person's property. Therefore, convictions for petit larceny, grand larceny, and/or shoplifting in violation of the various subsections of NYPL § 155 are all crimes involving moral turpitude.

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

> The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .

....

> [I]n 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 [now the Secretary of Homeland Security (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. Under section 212(h), qualifying relatives include U.S. citizen or lawful permanent resident spouses, parents, sons and daughters. The applicant must demonstrate extreme hardship to his U.S. citizen spouse and or child. Hardship to the applicant is considered only to the extent it results in hardship to the qualifying relative. If extreme hardship to a qualifying relative is established, we then assess whether an 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. *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.

On appeal, counsel for the applicant asserts that the Field Office Director failed to consider the facts of the applicant's case. Counsel explains that the applicant is a 56 year old husband with three minor U.S. citizen children and several adult children. He states that the applicant has very serious medical issues, including heart disease which has resulted in him having to have a pacemaker and being put on a heart transplant list. He also states that the applicant also suffers from diabetes mellitus, myocardial infraction and hypertension. Counsel explains that the applicant owns an automotive repair business which his spouse manages, and which is his and the applicant's sole source of income. Counsel states that the applicant's removal would lead to financial and emotional hardship to the applicant's current spouse and three children, including the loss of health insurance and an increased physical burden of having to care for three children as a single parent.

Counsel also asserts that the conditions in Peru are poor, and that relocating there would result in physical, medical and economic hardships rising to the level of extreme hardship for the applicant's spouse and three children. He explains that the applicant has resided in the United States since he was 11 years old, and that he would have no relatives or family ties in Peru help support himself or his spouse and three children. He notes that the applicant would lose his health insurance and struggle to receive the care he needs in Peru, resulting in physical, emotional and economic hardship to his spouse if she relocated and was the sole able-bodied parent. Finally, counsel notes the applicant has three CIMTs, but states has been active in the community and has been completely rehabilitated in the 10 years since his last conviction.

The applicant's spouse has submitted a letter stating that she and the applicant have children together, that she works at the automotive business her spouse owns and works at as the primary mechanic, and that they have a large mortgage on the home they share. She states that, without the

applicant, she would lose her job and their house and would have to take care of the children by herself. She states that even if she were to find another job she would not be able to support herself, her three children, and the applicant in Peru. She states that she fears for her husband's health and life if he is removed to Peru because of his medical conditions and age. She states that all of the applicant's family resides in the United States and that he would have no support or family ties upon returning to Peru.

The record includes patient visitation notes, hospital discharge printouts, prescription receipts, lab tests and reports and instructions for medical care. The notes and comments in these documents reflect that the applicant's spouse has heart disease, along with the other conditions noted above. There is, however, nothing in the record from a treating physician explaining in plain English the applicant's conditions or prognosis. The AAO is not is a position to analyze the documents submitted and cannot determine the extent of the applicant's medical conditions. The applicant's spouse has stated that she fears for the applicant's health and safety if he has to return to Peru, and that she will experience emotional hardship due to the applicant's removal because of the applicant having to cope with his medical conditions alone in Peru. While there is documentation related to the applicant's medical conditions, the record does not contain evidence that he would be unable to receive adequate medical treatment in Peru.

The record also contains tax records, pay stubs and other financial records pertaining to the applicant and his spouse's income and to the business which he owns. The record reflects that they have three children together and that the applicant also has a number of other children who reside in the United States. The applicant's spouse indicates that the children are also dependent on the income the applicant and his spouse earn from their automotive business.

Medical documentation in the record from New York indicates that the applicant was treated at the hospital in 2012. The documentation also indicates that the applicant had an address in New York and was employed by based in New York. Other medical documentation from dated December 13, 2012 states "The patient did not see his surgeon in New York postoperatively and he came on vacation to South Florida, visiting his family." This information appears to contradict the assertion that the applicant was vital to the operation of the automotive business. The record dos not establish the level of financial support the applicant provides to his family.

The record further indicates that the applicant's spouse was previously employed and earning $50,000 annually. The record reflects that two of the applicant's spouse's three children are teenagers, aged 12 and 17. There is no evidence that they would need extensive child care outside of the school day. The third child is 21 years old and it is unclear that this child is financially dependent on either the applicant or his spouse. While it will be an increased burden to have to provide for three children as a single parent, the record does not contain sufficient information on income and expenses to establish that the applicant's spouse would be unable to find adequate employment to support herself and her children.

When considered cumulatively, there is insufficient documentation to establish that the applicant's spouse would experience extreme hardship if the applicant was removed and she remained in the United States.

The applicant has asserted the conditions in Peru are poor and that his spouse and children would experience hardship upon relocation. The applicant states that he would lose his health insurance upon relocation and would have problems finding employment at his age and with his medical conditions. The record contains country conditions materials relating to Peru, but these materials are related to human rights studies done at a national level and it is unclear how this would impact the applicant's spouse if she were to join him in Peru. Without additional evidence which documents how the economic or social conditions would result in a hardship to the applicant's spouse and children the record fails to establish that they would experience extreme hardship upon relocation to Peru.

The evidence submitted into the record does not support the hardship assertions discussed above. As such, even when the hardships upon relocation are considered in the aggregate, the record fails to establish that these hardships rise to the level of extreme hardship.

As the applicant has failed to establish extreme hardship to his spouse on either separation or relocation, he is statutorily ineligible for a waiver of inadmissibility and no purpose would be served in determining whether he warrants a waiver as a matter of discretion.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. *See* 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.