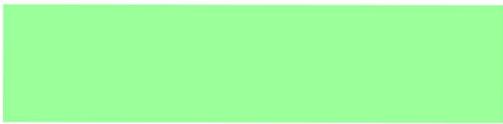




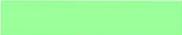
U.S. Citizenship
and Immigration
Services

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DATE: **NOV 06 2014**

OFFICE: LOS ANGELES

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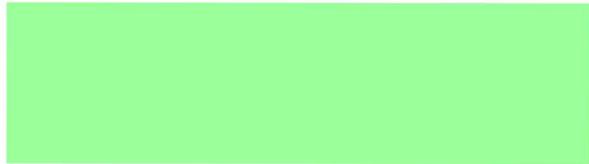
IN RE:

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:

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,


f

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Los Angeles, California, denied the waiver application 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 El Salvador 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 been convicted of 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 reside in the United States with his U.S. citizen spouse and children.

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated January 7, 2014.

On appeal, counsel submits the following: a brief, letters from the applicant's spouse and children, copies of the applicant's children's U.S. birth certificates, two articles about the impact of suicide on families, and psychological assessments of the applicant and his family. The entire record was reviewed and considered in rendering this decision.

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

(i) In General

Except as provided in clause (ii), 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, or.

(II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)),

is inadmissible.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of 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

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

In regard to the field office director's finding of inadmissibility, the record establishes that the applicant was convicted in October 1995 of Theft, a violation of section 484(a) of the California Penal Code (Cal. Penal Code). In addition, in November 1996, the applicant was convicted of Extortion, in violation of Cal. Penal Code § 520. The field office director noted that the crimes of theft and extortion involve moral turpitude.

At the time of the applicant's conviction for Theft, Cal. Penal Code § 484(a) stated:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile

character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

At the time of the applicant's conviction for Extortion, Cal. Penal Code § 520 stated:

Every person who extorts any money or other property from another, under circumstances not amounting to robbery or carjacking, by means of force, or any threat, such as is mentioned in Section 519, shall be punished by imprisonment in the state prison for two, three or four years.

For cases arising in the Ninth Circuit, the determination of whether a crime is a crime involving moral turpitude first requires the categorical inquiry set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005). If the statute “criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied.” *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); see also *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be “a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude.” *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a “realistic probability,” the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probability also exists where the statute expressly punishes conduct not involving moral turpitude. See *U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, “It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . .”);

Morasch v. INS, 363 F.2d 30, 31 (9th Cir. 1966)(stating, “Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].”) However, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Ninth Circuit Court of Appeals addressed the issue of whether Cal. Penal Code § 484(a) constitutes a crime involving moral turpitude in *Castillo-Cruz*. See 581 F.3d at 1157. The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a) and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). The Ninth Circuit cited to the Second District Court of Appeal’s opinion in *People v. Albert*, which held that the act of robbery, defined by the court as “larceny aggravated by use of force or fear,” requires an intended permanent taking. *Id.* (citing 47 Cal.App.4th 1004, 1007 (1996)). The Second District Court of Appeal emphasized that absent this specific intent, the taking of the property of another is not theft. 47 Cal.App.4th at 1008. A conviction for theft under the California Penal Code is categorically a crime involving moral turpitude because it requires the permanent intent to deprive the victim of his or her property.

In addition, U.S. courts have found that blackmail is a crime involving moral turpitude. *Lehman v. Carson*, 353 U.S. 685 (1957). (Ohio conviction for blackmail held to be a crime involving moral turpitude, subjecting alien to deportation, despite a grant of a conditional pardon by governor). Extortion requires that a force or threat be made for the purpose of acquiring something from the victim. Counsel has failed to establish that a prior case exists where extortion under the statute in question, or any other statute, was found not to be a crime involving moral turpitude.

The applicant does not contest that he has been convicted of crimes involving moral turpitude rendering him inadmissible to the United States pursuant to section 212(a)(2)(A) of the Act. We have reviewed the statutes, case law and other documents related to these convictions, as well as the relevant precedent decisions from the Board of Immigration Appeals and the courts. We concur with the field office director that the applicant has been convicted of multiple crimes involving moral turpitude and is therefore inadmissible under section 212(a)(2)(A)(i) of the Act.

As the above-referenced crimes involving moral turpitude occurred more than fifteen years ago, we first consider whether the applicant is eligible for a waiver of inadmissibility under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) requires that the applicant establish that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

On appeal, counsel has submitted evidence establishing that the applicant and his U.S. citizen spouse married in 1993, over twenty years ago. They have five U.S. citizen children. The applicant has been residing in the United States since 1990 and has been gainfully employed, since 1999, with [REDACTED]. The applicant has established significant long-term family, community and employment ties in the United States. Numerous letters have been submitted from the applicant's family members establishing the hardships they would experience were the applicant to relocate abroad.

Nevertheless, the record establishes that in November 2012, while his I-485, Application to Register Permanent Residence or Adjust Status, was pending, the applicant was convicted of four counts of secret recording inside a bathroom in violation of Cal. Penal Code § 647(j)(3), Disorderly Conduct, as a result of his arrest in May 2012.¹

At the time of his conviction, Cal. Penal Code § 647(j) stated, in pertinent part:

Except as provided in subdivision (I), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

....

(3)(A) Any person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person.

In a 2012 supplemental psychological report prepared by [REDACTED] PsyD and submitted by counsel on appeal, Dr. [REDACTED] states the following:

On 11/15/12, I was contacted by [REDACTED], a supervising attorney for the Special Victims section of [REDACTED] Attorney's Office in this matter. Mr. [REDACTED] has reviewed my report, and subsequently sent me an email with additional information in this case, which had not been previously available. In his email, Mr. [REDACTED] noted that 'the undisputed evidence at trial was that [the applicant's] secret video recording activity was going on for at least a year, and approximately 50 hours of video from that time period, involving hundreds of women and girls, were recovered by the police and introduced in evidence.'

Mr. [REDACTED] further noted that 'interspersed among those 135 files were 62 files of video recording of persons using the bathroom.' According to the same

¹ We are not aware of any published BIA or Ninth Circuit decision that has addressed whether a violation of Cal. Penal Code § 647(j)(3) is a crime involving moral turpitude. Irrespective of this, the applicant remains inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for his theft and extortion convictions, as discussed in detail above, and it is thus not necessary to determine whether the applicant's conviction under Cal. Penal Code § 647(j)(3) is a crime involving moral turpitude.

email, the discover included 50 hours of video recording depicting senior and adult women, as well as teenage girls and prepubescent girls using the toilet....

[The applicant] stated that he had an attraction to a female member of the church, and would only watch the video footage when she attended church services. He acknowledged that he and this woman have never been involved in a relationship, and stated that he had never distributed the video footage or transferred it to a compact disk.

See Supplemental Report from [REDACTED] PsyD, *Clinical and Forensic Psychology*.

Based on the applicant's conviction under Cal. Penal Code § 647(j), the applicant has not established that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States. Moreover, as the applicant's conviction under Cal. Penal Code § 647(j) was in 2012, less than two years ago, rehabilitation has not been established. Accordingly, the applicant has not shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Even if the applicant had been able to establish that he met the requirements of section 212(h)(1)(A) of the Act, we find that the unfavorable factors in this case, including entry without inspection, periods of unlawful presence and employment, his placement in removal proceedings, his convictions for Theft and Extortion in the mid-90s, and most notably, his 2012 conviction for making secret recordings in a bathroom with the intent to invade privacy, outweigh the favorable factors in this application. Therefore, a favorable exercise of the Secretary's discretion as outlined in section 212(h)(2) of the Act would not be warranted.

We next make a determination as to whether the applicant has established eligibility for the grant of a waiver under section 212(h)(1)(B) of the Act.

A waiver of inadmissibility under section 212(h)(1)(B) 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. The qualifying relatives in this case are the applicant's spouse and children. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. 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-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, 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.

With respect to establishing hardship were the applicant's U.S. citizen spouse to remain in the United States while the applicant relocates abroad due to his inadmissibility, a declaration has been provided from the applicant's spouse. In the declaration, the applicant's spouse states that her husband is a great support for the family and his absence would cause her and her children economic, moral and sentimental struggles. The applicant's spouse asserts that she wants to restore the family and resume their normal lives.

We acknowledge the applicant's spouse's and children's contentions that they will experience hardship were they to remain in the United States while the applicant resides abroad, but the record does not establish the severity of these hardships or the effects on their daily lives. As for the economic hardship referenced, the applicant has not established that he is unable to obtain gainful employment in El Salvador that would permit him to assist his wife and children in the United States. Alternatively, the applicant has not established that his wife is unable to obtain gainful employment. We note that the record establishes that the applicant's spouse was unable to work for a few months in 2008 due to thyroid cancer, but the letter provided by her physician to support that was written in 2008, more than six year ago. The record does not establish the applicant's spouse's current medical condition or treatment plan or whether there are any limitations on her ability to work. Finally, the record establishes that the applicant's spouse's children range in age from 16 to 29 years old. The applicant has not established that the applicant's spouse's older children would be unable to assist their mother and their siblings as needed. 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)).

We recognize that the applicant's spouse and children will endure hardship as a result of a long-term separation from the applicant. However, their situation if they remain in the United States is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record. We conclude that based on the evidence provided, it has not been established that the applicant's U.S. citizen spouse or children will experience extreme hardship were they to remain in the United States while the applicant resides abroad due to his inadmissibility.

With respect to relocating abroad to reside with the applicant due to his inadmissibility, the record establishes that the applicant's children are fully integrated into the United States lifestyle and educational system. The Board of Immigration Appeals (BIA) found that a fifteen-year-old child who lived her entire life in the United States, who was completely integrated into the American lifestyle, and who was not fluent in Chinese, would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). We find *Matter of Kao and Lin* to be persuasive in this case due to the similar fact pattern. To uproot the applicant's children at this stage of their education and social development and relocate them to El Salvador would constitute extreme hardship to them and to the applicant's spouse. In addition, the record establishes that the applicant's spouse has been residing in the United States for over 30 years and the applicant's children were born and raised in the United States. Finally, the U.S. Department of State has issued a Travel Warning for El Salvador due to the critically high levels of crime and violence.

See *Travel Warning-El Salvador, U.S. Department of State*, dated April 25, 2014. It has thus been established that the applicant's spouse and children would suffer extreme hardship were they to relocate abroad to reside with the applicant due to his inadmissibility.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. Cf. *Matter of Age*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also cf. *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the applicant's spouse or children in this case.

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.

However, even if the applicant had established extreme hardship to his spouse and/or children, a favorable exercise of the Secretary's discretion as outlined in section 212(h)(2) of the Act would not be warranted, as discussed in detail above, because the unfavorable factors in this case, including entry without inspection, periods of unlawful presence and employment, his placement in removal proceedings, his convictions for Theft and Extortion in the mid-90s, and most notably, his 2012 conviction for making secret recordings in a bathroom with the intent to invade privacy, outweigh the favorable factors in this application.

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.