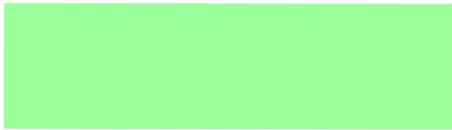


(b)(6)

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

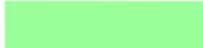


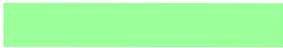
U.S. Citizenship
and Immigration
Services



Date: JAN 06 2015

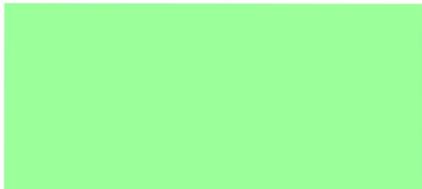
Office: TAMPA

FILE: 

IN RE: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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, Tampa, Florida. 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 Cuba who is inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for falsely claiming that he was a U.S. citizen in 1995. The applicant was also found inadmissible under 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. As such, the applicant required a waiver of inadmissibility pursuant to sections 212(i) and 212(h) of the Act, 8 U.S.C. § 1182(i) and 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and U.S. citizen children.

The Field Office Director concluded that the applicant failed to establish hardship to his qualifying relatives and also failed to show that he is rehabilitated. The Field Office Director denied the application accordingly. *See Decision of the Field Office Director*, dated February 2, 2012.

On appeal, filed March 2, 2012 and received at the AAO February 18, 2014, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) did not question the applicant or his family members about the evidence submitted concerning the applicant's rehabilitation or the hardship his family would experience without him.

On June 23, 2014, we issued a request for evidence (RFE), providing the applicant with an additional opportunity to submit evidence in support of his eligibility for a waiver of inadmissibility. We specifically requested evidence that the applicant's U.S. citizen spouse, his qualifying relative, would experience extreme hardship in the event that he is denied admission into the United States and she relocated to Cuba or in the event that she remained in the United States. The applicant submitted additional evidence on September 16, 2014, including but not limited to photographs; updated letters from the applicant, his family members and friends; copies of previously submitted evidence, accompanied by identification documentation; and a list of his relatives in the United States.

In support of the waiver application, the record includes, but is not limited to: briefs written on behalf of the applicant; letters from the applicant, his family members, ex-spouse, and friends; documentation regarding the applicant's criminal history; identification documentation for the applicant and his family; financial documentation; and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides:

The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of an alien granted classification under clause (iii) or (iv) of section 204 (a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

The record indicates that on November [REDACTED], the applicant was convicted of making a False Statement in Application or Passport in U.S. district court in Tampa, Florida, after falsely claiming to be a U.S. citizen. As the applicant's false claim to U.S. citizenship occurred prior to September 30, 1996, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, instead of section 212(a)(6)(C)(ii) of the Act. He therefore is eligible to seek a waiver under 212(i) of the Act. The applicant does not contest his inadmissibility under this section of the Act.

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 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, that:

The [Secretary] 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 if-

- (1) (A) in the case of any immigrant it is established to the satisfaction of the [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 [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 [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.

The record indicates that on or around April [REDACTED] the applicant was convicted of possessing one gram of cannabis. The applicant was sentenced to two days of confinement, one year of probation and fees. The applicant was convicted of a controlled substance violation rendering him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Section 212(h) of the Act allows for a waiver of inadmissibility only when the conviction relates to a single offense of simple possession of 30 grams or less of marijuana. As the applicant's conviction falls within these parameters, the applicant is therefore eligible for a waiver.

The record also establishes that on July [REDACTED] the applicant was convicted in Tampa for petit theft in violation of Fla. Stat. § 812.014.

Fla. Stat. § 812.014 states in relevant part:

- (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
 - (a) Deprive the other person of a right to the property or a benefit from the property.
 - (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

For cases arising in the Eleventh Circuit, the determination of whether a conviction is a crime involving moral turpitude begins with a categorical inquiry that "depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." *Itani v. Ashcroft*, 298 F.3d 1213, 1215-16 (11th Cir. 2002); *see also*

Vuksanovic v. U.S. Att’y Gen., 439 F.3d 1308, 1311 (11th Cir. 2006) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *Sosa-Martinez v. U.S. Att’y Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2004). However, where the statute under which an individual was convicted is “‘divisible’—that is, it contains some offenses that are [crimes involving moral turpitude] and others that are not[,] . . . the fact of conviction and the statutory language alone are insufficient to establish . . . under which subpart [the alien] was convicted.” *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005). Under such circumstances, “the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered.” *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) (citing *Jaggernaut*, *supra*, at 1354-55). The Eleventh Circuit does not permit inquiry beyond the record of conviction. *See Fajardo*, *supra*, at 1310 (11th Cir. 2011) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

A plain reading of Fla. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). As the minimum conduct needed for a conviction under Fla. Stat. § 812.014 does not involve moral turpitude, we cannot find that a violation of Fla. Stat. § 812.014 is categorically a crime involving moral turpitude.

In a 2013 decision, the Supreme Court held that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements. *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Court noted that the modified categorical approach was developed so that when a statute was divisible and referred to several different crimes, “courts could discover which statutory phrase, contained within a statute listing several different crimes, covered a prior conviction.” *Id.* at 2284-85 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009) (internal quotation marks omitted)); *see also Johnson v. United States*, 559 U.S. 133, 144 (2010) (“[T]he ‘modified categorical approach’ that we have approved permits a court to determine which statutory phrase was the basis for the conviction.”).

In *Matter of Chairez-Castrejon*, the BIA revisited its method of determining whether a criminal statute is divisible and held that the approach to divisibility applied in *Descamps* also applied in the immigration context. 26 I&N Dec. 349, 352-5 (BIA 2014) (reconsidering *Matter of Lanferman*, 25 I & N Dec. 721 (BIA 2012) and “withdraw[ing] from that decision to the extent that it is inconsistent with *Descamps*.”). The BIA noted that after *Descamps*, a criminal statute is divisible “only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of ‘elements,’ more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match” to the relevant generic offense. *Id.* at 353. The BIA further explained that for purpose of determining whether a statute is truly divisible, an offense’s elements are those facts about the crime which “[t]he Sixth Amendment contemplates that a jury—not a sentencing court—

will find . . . unanimously¹ and beyond a reasonable doubt.” *Id.* at 353 (quoting *Descamps* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999))). The BIA found that a statute was not divisible merely because it “disjunctively enumerated intent, knowledge, and recklessness as alternative mental states” and further stated that the statute “can be ‘divisible’ into three separate offenses with distinct mens rea only if . . . jury unanimity regarding the mental state” was required. *Id.* at 352-354. As it had not been established that jury unanimity was required, the BIA held that the alternative mens rea were merely alternative “means” of committing the crime rather than alternative “elements” of the offense. *Id.* at 355.

As noted above, in the present matter the applicant’s conviction for petit theft is not categorically a crime involving moral turpitude, because the statute includes intent either to temporarily or permanently deprive the owner of the property. It is thus necessary to determine whether the statute is divisible into separate offenses with distinct mens rea, or whether intent to temporarily or permanently deprive are merely alternative means of committing the offense. To do so we turn to the Florida Supreme Court’s Standard Jury Instructions for Criminal Cases. Specifically, to prove the crime of theft, the jury instructions state, in pertinent part:

[T]he State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) knowingly and unlawfully [obtained or used] [endeavored to obtain or to use] the (property alleged) of (victim).
2. [He] [She] did so with intent to, either temporarily or permanently,
 - a. [deprive (victim) of [his] [her] right to the property or any benefit from it.]
 - b. [appropriate the property of (victim) to [his] [her] own use or to the use of any person not entitled to it.]

Based on the Florida Supreme Court’s Standard Jury Instructions, a jury in a case concerning an alleged violation of Fla. Stat. § 812.014 does not need to unanimously determine whether the defendant intended to either “temporarily or permanently” deprive or appropriate property. A jury could convict a defendant of Fla. Stat. § 812.014 without agreeing on whether the defendant had the intent to permanently deprive or appropriate property or, alternatively, temporarily deprive or appropriate property, so rather than describing two separate types of theft offenses, the statute describes different *means* to commit the one offense. While the language at issue — “with intent to, either temporarily or permanently,” — may be disjunctive, it does not render the statute divisible so as to warrant a modified categorical inquiry, and the use of the modified categorical approach is not permissible. As a modified categorical approach is unavailable because the statute is not divisible, we are unable to determine that the applicant was convicted of a crime involving moral turpitude.

¹ The BIA noted that in states where jury unanimity is not required, “we deem the ‘elements’ of the offense to be those facts about which the jury was required to agree by whatever vote was required to convict in the pertinent jurisdiction.” 26 I&N Dec. at 353, n. 2.

As the offense defined by Fla. Stat. § 812.014 is neither a categorical crime involving moral turpitude nor divisible as defined in *Descamps* and *Chairez-Castrejon*, we find that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Nonetheless, the applicant still requires a waiver under sections 212(h) and 212(i) of the Act. As the applicant's waiver application under section 212(i) of the Act is the most restrictive of the waivers for which he is applying, his appeal will be adjudicated in accordance with this section. Establishing extreme hardship under section 212(i) of the Act will also satisfy the requirements for a waiver of inadmissibility under section 212(h) of the Act. A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent. Hardship to the applicant is not considered unless it causes hardship to a qualifying relative, in this case the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, 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, 885 (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 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.

The qualifying spouse indicates in her September 1, 2014, letter that she relies on the applicant for emotional, physical and medical issues. She states that the applicant is “always by [her] side,” he cooks meals for her, and that she needs him and does not know what would happen to her without him. In addition to these statements, the applicant’s sister also states that the applicant supports his wife and the applicant’s pastor states that the applicant and his wife are devoted to one another and are happy. Other than these assertions, the record provides no further evidence regarding potential emotional hardships facing the qualifying spouse upon separation. While it is understandable that the applicant’s spouse would experience some emotional difficulties if she remains in the United States without the applicant, the record provides little detail regarding the specific emotional hardships that she would experience upon separation.

Regarding potential physical and medical hardships that the qualifying spouse could face upon separation, she states that she “relies on [the applicant concerning problems related to [her] illnesses, because [she has] had various surgeries and he is the one that takes care of [her] and gives [her] medicine.” The qualifying spouse also indicates that the applicant drives for her because she has vision issues that make her unfit to drive. However, no objective evidence supports such assertions. Absent an explanation in plain language from the treating physician or medical professional of the exact nature and severity of any medical condition and a description of any treatment or family assistance needed, we are not in the position to reach conclusions concerning the severity of the applicant’s spouse’s health or the treatment she needs. Moreover, the record does not contain any other references to the qualifying spouse’s medical conditions from family members or otherwise. The qualifying spouse’s assertions are evidence and will be considered. However, going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)). As such, the applicant failed to provide sufficient evidence to establish that the qualifying spouse would suffer emotional, physical or medical hardships as a result of her separation from the applicant that, considered in the aggregate, are extreme.

The record fails to address the hardship that the applicant's qualifying spouse, a native of Cuba, would experience if she were to relocate there. While the record corroborates claims that the applicant has extensive ties to the United States, including close ties to his family and the community, the record lacks evidence regarding the qualifying spouse's ties to the United States. The record also lacks evidence regarding whether the qualifying spouse has family in Cuba who could support her and the applicant upon relocation. The applicant does not address how the applicant's spouse would be affected specifically by any adverse conditions there.

The record references hardships that the applicant's children and siblings would face if he had to return to Cuba. Though Congress did not include hardship to an alien's children or siblings as a factor to be considered in assessing extreme hardship under section 212(i) of the Act, and the applicant's spouse is the only qualifying relative for the waiver, hardship to their children or other family members will be considered as it may affect the applicant's spouse. However, the record fails to provide specific detail about the qualifying spouse's hardships as a result of the potential hardships to the applicant's children and other family members.

In this case the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The applicant has not established extreme hardship to his U.S. citizen spouse as required under section 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

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.