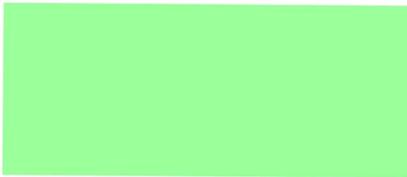
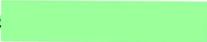


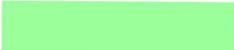
(b)(6)



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

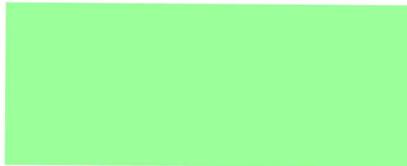


DATE: **JAN 26 2015** OFFICE: NEBRASKA SERVICE CENTER File 

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:

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,


for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the waiver application and an appeal was dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO on motion. The motion will be granted and the previous decision of the AAO is affirmed.

I. FACTUAL AND PROCEDURAL HISTORY

The applicant is a native and citizen of India 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 mother.

The director concluded that because the applicant is statutorily inadmissible as a result of his conviction for a crime relating to a controlled substance, no purpose would be served in adjudicating his application for a waiver for crimes involving moral turpitude pursuant to section 212(h) of the Act. The director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Director*, dated August 30, 2013.

On appeal, we determined that the applicant's June 1997 conviction for Use/Under the Influence of a Controlled Substance, in violation of California Health and Safety Code (H&S) section 11550 constituted a crime related to a controlled substance, rendering him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Because the applicant had not shown that his conviction related to a single offense of simple possession of 30 grams or less of marijuana, we concurred with the director that the applicant was statutorily ineligible for a waiver pursuant to section 212(h) of the Act. The appeal was consequently dismissed. *Decision of the AAO*, dated May 8, 2014.

On motion, counsel for the applicant has asked us to reconsider the applicant's case in light of the fact that the Superior Court of California, ██████████ County had recently set aside one of the applicant's judgments pursuant to § 1016.5 of the California Penal Code (Cal. Penal Code). Specifically, the applicant's June ██████████ conviction for Use/Under the Influence of a Controlled Substance, in violation of H&S § 11550, was set aside on October 16, 2013. In support, a copy of the referenced court document was submitted. The entire record was reviewed and considered in rendering this decision.

II. REVIEW OF THE DIRECTOR'S DECISION

A. Law

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.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

...

- (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).

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

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.

B. The Applicant's June 1997 Conviction for Use/Under the Influence of a Controlled Substance is Eliminated for Immigration Purposes

On motion, the applicant has established that the Superior Court of California set aside his guilty plea for Use/Under the Influence of a Controlled Substance and vacated the judgment pursuant to Cal. Penal Code § 1016.5 on finding that the trial court did not deliver the mandatory immigration warnings at the time the pleas were taken.

Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999); *See also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (stating that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes). In *Matter of Rodriguez-Ruiz*, the Board of Immigration Appeals (BIA) held that a conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes. 22 I&N Dec. 1378, 1379 (BIA 2000). As the court vacated the applicant's conviction for Use/Under the Influence of a Controlled Substance pursuant to Cal. Penal Code § 1016.5 for reasons related to a procedural or substantive defect in the underlying criminal proceedings rather than under a rehabilitative provision, this specific conviction is eliminated for immigration purposes.

- C. The Applicant's February 2000 Petty Theft Infraction in violation of Cal. Penal Code §§ 484/488 and 490.1 is a Conviction for purposes of Section 101(a)(48)(A) of the Act

Despite the dismissal of the above-referenced conviction, the question remains whether the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act. As noted in our previous decision, the record establishes that the applicant was convicted on or about June [REDACTED] of Petty Theft, in violation of Cal. Penal Code §§ 484/488. In addition, the record establishes that on or about February [REDACTED] the applicant plead guilty to an infraction of Petty Theft, in violation of Cal. Penal Code §§ 484/488 and 490.1.

At the time of the applicant's convictions, 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 her], 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 or [her] 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 theft²

Cal. Penal Code § 490.1 stated:

(a) Petty theft, where the value of the money, labor, real or personal property taken is of a value which does not exceed fifty dollars (\$50), may be charged as a misdemeanor or an infraction, at the discretion of the prosecutor, provided that the person charged with the offense has no other theft or theft-related conviction.

(b) Any offense charged as an infraction under this section shall be subject to the provisions of subdivision (d) of Section 17 and Sections 19.6 and 19.7.

A violation which is an infraction under this section is punishable by a fine not exceeding two hundred fifty dollars (\$250).

Cal. Penal Code § 488 stated:

Theft in other cases is petty theft.

² Bracketed language reflects 2000 legislative amendments to the statute.

In a letter submitted with the applicant's Form I-601, previous counsel contends that the applicant's [REDACTED] petty theft offense is his only conviction for immigration purposes since his [REDACTED] conviction was for a theft infraction which should not be considered a conviction for immigration purposes pursuant to *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004). Counsel maintains that the offense in *Matter of Eslamizar* is analogous to an infraction under Cal. Penal Code § 490.1 and that the constitutional safeguards unavailable to the respondent in *Eslamizar*, which led the Board of Immigration Appeals (BIA) to conclude that he had not been convicted in a genuine criminal proceeding, are also not provided to individuals under Cal. Penal Code § 490.1, including the right to a trial by jury and the right to counsel. Consequently, previous counsel states that the applicant's 2002 petty theft conviction falls under the petty offense exception of section 212(a)(2)(A)(ii)(II) of the Act and does not bar his admission to the United States.

We will first address counsel's contention with respect to the applicant's petty theft infraction. We conclude that the applicant's petty theft infraction is a "conviction" under section 101(a)(48)(A) of the Act because it is a "formal judgment of guilt of the alien entered by a court."

Section 101(a)(48) of the Act provides:

- (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
 - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The BIA has held that for a formal judgment of guilt to qualify as a conviction, it must be entered in a proceeding that is "criminal in nature under the governing laws of the prosecuting jurisdiction." *Matter of Eslamizar*, 23 I&N Dec. 684, 688 (BIA 2004). See also *Matter of Cuellar-Gomez*, 25 I&N Dec. 850, 852 (BIA 2012); *Matter of Rivera-Valencia*, 24 I&N Dec. 484, 486-87 (BIA 2008). In *Matter of Eslamizar*, the BIA noted that in Oregon, although a trial for a "violation" is subject to the criminal procedure laws of Oregon, state law defines "crimes" and "violations" in "mutually exclusive terms." 23 I&N Dec. at 687. The BIA additionally considered a decision of the Oregon Court of Appeals concluding that conduct that led to prosecution as a violation "was not a crime, and the prosecution of the conduct was not a criminal prosecution." *Id.* (quoting *State v. Rode*, 848 P.2d 1232, 1235 (Or. Ct. App. 1993)). The BIA considered the fact that the State needed only prove the defendant's violation by a preponderance of the evidence as a significant factor in determining that the proceedings were not genuine criminal proceedings and stated,

It is a bedrock principle of the Constitution of the United States that each element of an offense or crime must be proved beyond a reasonable doubt It is beyond debate, therefore, that the respondent, who was found ‘guilty’ under the lesser standard of a preponderance of the evidence, was not found guilty of his ‘violation’ in a true criminal proceeding.

23 I&N Dec. at 688.

Consequently, the BIA held that a finding of guilt in a violation proceeding under Oregon law was not a conviction within the meaning of section 101(a)(48) of the Act as the proceeding had not been a genuine criminal prosecution. *Id.*

In *People v. Waxler*, the California First District Court of Appeals held that despite being classified as an infraction punishable by a fine of not more than \$100, possession of up to an ounce of nonmedical marijuana in California is a “crime.” 224 Cal.App.4th 712, 721-23, 168 Cal.Rptr.3d 822 (2014); see also *People v. Simpson*, 223 Cal.App.4th Supp. 6,9, 167 Cal.Rptr.3d 396, 398-99 (2014) (stating that an infraction “is a criminal matter subject generally to the provisions applicable to misdemeanors, except for the right to a jury trial, the possibility of confinement as a punishment, and the right to court-appointed counsel if indigent”). The court in *Waxler* stated, “An infraction . . . is still a ‘crime’ under Penal Code section 16.”³ *Id.* at 715. Unlike the offense in *Eslamizar*, an infraction under California law must be proven beyond a reasonable doubt and is classified as a crime, with most of the provisions of law relating to misdemeanors applying to infractions. See Cal. Penal Code §§ 1096, 19.7 (“Except as otherwise provided by law, all provisions of law relating to misdemeanors shall apply to infractions including, but not limited to, powers of peace officers, jurisdiction of courts, periods for commencing action and for bringing a case to trial and burden of proof.”).

In another decision, the BIA concluded that a judgment of guilt entered against the respondent by the [redacted] municipal court was a conviction for immigration purposes because the judgment was entered in a “genuine criminal proceeding.” *Matter of Cuellar-Gomez*, 25 I&N Dec. 850, 852 (BIA 2012). The BIA observed that for criminal cases in municipal court the prosecution has the burden to prove the charge beyond a reasonable doubt, and that a judgment of guilt entered by a municipal court is considered a valid conviction for purposes of calculating the defendant’s criminal history. *Id.*

In California, although an individual charged with an infraction does not have a right to counsel except in limited circumstances, an infraction in California is not punishable by imprisonment. Cal. Penal Code § 19.6.⁴ In *Cuellar-Gomez*, the BIA noted that although the proceedings did not provide

³ Section 16 of the Cal. Penal Codes states that crimes and public offenses include: 1. Felonies; 2 Misdemeanors; and 3. Infractions.

⁴ Section 19.6 of the Cal. Penal Code states, “An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him or her unless he or she is arrested and not released on his or her written promise to appear, his or her own recognizance, or a deposit of bail.”

the defendant with an absolute right to counsel, but only provided indigent defendants with appointed defense counsel if there was a possibility of imprisonment, this practice was consistent both with the Constitution and with general criminal practice in state courts. 25 I&N Dec. at 854 (citing *Alabama v. Shelton*, 535 U.S. 654 (2002) and *Scott v. Illinois*, 440 U.S. 367 (1979)). The BIA therefore found that as the absence of a right to counsel in such circumstances has been upheld by the U.S. Supreme Court, it was consistent with a genuine criminal proceeding. *Cuellar-Gomez*, *supra*, at 854.

The proceeding in *Cuellar-Gomez* was in a Kansas municipal court, where judges have authority to enter judgments of guilt in drug possession cases and to impose fines or order incarceration of defendants found guilty. *See Cuellar-Gomez* at 853 (citing Kan. Stat. Ann. §§ 12-4104(a)(5), 12-4106). The BIA found that the applicant's bench trial in [REDACTED] municipal court qualified as a genuine criminal proceeding since he had a right to a trial de novo in State district court. *Id.* at 854. Under California law, a person charged with an infraction is not entitled to a jury trial, but unlike in the proceedings in *Cuellar-Gomez*, in which the court had the authority to order incarceration, an infraction is not punishable by imprisonment. *See Cal. Penal Code* § 19.6. The BIA noted in *Eslamizar* that the absence of a right to a jury trial in such circumstances has long been upheld by the U.S. Supreme Court. *Eslamizar*, *supra*, at 688, n.4 (citing *Lewis v. United States*, 518 U.S. 322 (1996)).

Under California law, an infraction is classified as a crime, with most provisions of law relating to misdemeanors applying to infractions, and the state has the burden of proving guilt beyond a reasonable doubt. Although a defendant charged with an infraction is not entitled to a jury trial or appointed counsel, the absence of these rights has been upheld where there is no possibility of imprisonment. The proceeding in which the applicant pleaded guilty to an infraction for theft was therefore criminal in nature under California law. A violation which is an infraction is punishable by a fine not exceeding \$250, and the applicant was ordered to pay a fine of \$50 and penalty assessment of \$85. *See Cal. Penal Code* § 490.1. The BIA has previously determined that the imposition of costs and surcharges in a criminal sentence constitutes a "form of penalty or punishment." *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008). Based on the foregoing, we conclude the applicant's February 4, 2000, theft offense is a conviction within the meaning of section 101(a)(48) of the Act.

D. The Applicant's [REDACTED] Petty Theft convictions are for Crimes Involving Moral Turpitude

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).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the “limited, specified set of documents” that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); see also *Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas-Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. See *Olivas-Motta v. Holder*, 716 F.3d 1199, 1203 (9th Cir. 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

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.

Therefore, we find that the applicant's June [REDACTED] conviction of Petty Theft and the applicant's February [REDACTED] infraction for Petty Theft render the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. As a result of having been convicted of two crimes of moral turpitude, the applicant is statutorily ineligible for the petty offense exception pursuant to Section 212(a)(2)(A) of the Act.

E. The Applicant has Not Established Extreme Hardship Pursuant to Section 212(h) of the Act

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, which includes the U.S. citizen or lawfully resident spouse, parent or child of the applicant. In the present case, the applicant's U.S. citizen mother is the only qualifying relative. Hardship to the applicant or his U.S. citizen sister 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 BIA 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 BIA 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 BIA 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 BIA 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.

The applicant’s U.S. citizen mother contends that she will suffer emotional and financial hardship were she to remain in the United States while her son continues to reside abroad due to his inadmissibility. In a declaration, the applicant’s mother explains that her son has been living outside the United States for more than a decade and she is sad and worried for him. She maintains that she cries and is unable to sleep due to her distress. She further notes that she wants her son around in her old age. She asserts that were the applicant to live in the United States, he would bring happiness and peace to her life.

While we acknowledge the applicant’s mother’s contention that she will experience emotional hardship were she to remain in the United States while her son continues residing abroad, the record does not establish the severity of this hardship or the effects on her daily life. We note that the applicant has been living abroad since 2002. The record does not establish the specific hardships the applicant’s mother has been experiencing as a direct result of her son’s long-term absence. The record establishes that the applicant’s mother is gainfully employed, does volunteer work, is being treated for her medical conditions, and has a support network which includes her daughter, her friends, and her church. 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)). It has thus not been established that the

applicant's mother would experience extreme hardship were she to remain in the United States while her son continues to reside abroad as a result of his inadmissibility.

In regard to relocating abroad to reside with the applicant as a result of his inadmissibility, the applicant's mother maintains that she would experience extreme hardship. To begin, the applicant's mother explains that the father of her children was abusive and she fears returning to India because she is afraid of what he may do to her. In addition, the applicant's mother details that she suffers from numerous medical conditions that require ongoing treatment. Previous counsel explains that the applicant's mother has been residing in the United States since 1990, almost twenty-five years ago, and has extensive community ties in the United States, including friends, her U.S. citizen daughter, and her church. Further, previous counsel details that the applicant's mother is gainfully employed in the United States, volunteers for the [REDACTED] and owns property in the United States. Counsel maintains that were she to relocate to India, she would not be able to be able to continue paying all her bills.

In support, the applicant has submitted medical documentation establishing his mother's medical conditions and treatment plan. In addition, the applicant has submitted a letter from his U.S. citizen sister outlining the abuse the applicant's mother experienced. Moreover, the applicant has submitted documentation establishing his mother's gainful employment and volunteer work. Were the applicant's mother to relocate abroad to reside with her son, she would have to leave her home, her friends, her daughter, her church, her gainful employment, her volunteer work, her home, her medical providers, and her community. It has thus been established that the applicant's mother would suffer extreme hardship were she 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 Ige*, 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 qualifying relative in this case.

III. CONCLUSION AND ORDER

We find that the applicant's June [REDACTED] conviction for Petty Theft and the applicant's February [REDACTED] infraction for Petty Theft render the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. A waiver of inadmissibility pursuant to section 212(h) of the Act is required.

On motion, the record, reviewed in its entirety, does not support a finding that the applicant's U.S. citizen mother will face extreme hardship if the applicant is unable to reside in the United States.

Rather, the record demonstrates that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a son or daughter is removed from the United States or is refused admission. There is no documentation establishing that the applicant's mother's hardships are any different from other families separated as a result of immigration violations. Although we are not insensitive to the applicant's mother's situation, the record does not establish that the hardships she would face rise 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 motion will be granted and the previous decision of the AAO dismissing the appeal is affirmed.