



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF M-G-G-

DATE: JULY 1, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF  
INADMISSIBILITY

The Applicant, a native and citizen of Ecuador, seeks a waiver of the ground of inadmissibility for a crime involving moral turpitude. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Field Office Director, Newark, New Jersey, denied the application. The Director concluded that the Applicant's theft conviction was for a crime involving moral turpitude, rendering her inadmissible. The Director further found that the Applicant had not established extreme hardship to her qualifying relative if the waiver were to be denied. We dismissed the subsequent appeal, concluding that the Applicant had not been convicted of theft for immigration purposes and was therefore not inadmissible.

The matter is now before us on our own motion to reopen.<sup>1</sup> Upon review of the record, we withdraw our prior decision and will sustain the appeal because the Applicant has established extreme hardship to a qualifying relative.

I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for a crime involving moral turpitude. Specifically, the Applicant pleaded guilty to third-degree theft by unlawful taking. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides that any foreign national convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. Section 101(a)(48) of the Immigration and Nationality Act (the Act) provides:

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<sup>1</sup> We have authority under 8 C.F.R. § 103.5(a)(5) to reopen our decisions on our own motion.

(b)(6)

*Matter of M-G-G-*

(A) The term “conviction” means . . . a formal judgment of guilt . . . 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.

Individuals found inadmissible under section 212(a)(2)(A) of the Act may seek a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). Section 212(h) of the Act provides for a discretionary waiver if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter.

## II. ANALYSIS

The Applicant does not contest that third-degree theft in New Jersey is a crime involving moral turpitude. The issue in this proceeding is whether the Applicant has a theft conviction for immigration purposes, and if she does, whether she has established extreme hardship to her spouse, whether he remains in the United States without her or accompanies her abroad. The Applicant asserts that if she is not allowed admission into the United States, her spouse will suffer extreme hardship from health problems.

### A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(2)(A) for committing a crime involving moral turpitude. Specifically, the record shows that in [REDACTED] 2009, she pleaded guilty under section 2C:20-3 of the New Jersey Code of Criminal Justice to third-degree theft by unlawful taking. The court permitted her to apply for a Pretrial Intervention Program and ordered that she pay restitution of \$50,000. The record further shows that she completed the pretrial program, and 3 years later, in [REDACTED] 2013, the charges against her were dismissed.

Where an individual pleads guilty or nolo contendere, or is found guilty, but entry of the judgment is deferred by the court to allow for a period of probation and/or completion of a diversion program, the alien has been convicted for immigration purposes even if the charges are later dismissed. *See Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 714-15 (A.G. 2005); *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999).

By contrast, an alien has *not* been convicted for immigration purposes where the criminal charges were dismissed following successful completion of a pretrial diversion program which occurred prior to any pleading or finding of guilt. *Matter of Grullon*, 20 I&N Dec. 12, 14-15 (BIA 1989) (citing *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988)). For there to be no conviction in such a case,

the alien must not have entered a plea of guilty or nolo contendere and there must have been no adjudication of guilt or imposition of punishment or restraint by a court. *Id.*

We dismissed the Applicant's appeal on finding that she did not have a conviction for theft under immigration law because she had not entered a plea of guilty or admitted to facts to warrant a finding of guilt, and the New Jersey Rules of Court Governing Criminal Practice did not require an informal admission or entry of a plea of guilt for participation in the Pretrial Intervention Program.<sup>2</sup> The record now contains evidence indicating that the Applicant had entered a guilty plea to the theft charge. Even though the theft charge was later dismissed, the Applicant has been convicted of theft for immigration purposes. See *Matter of Marroquin-Garcia* and *Matter of Roldan-Santoyo*, *supra*.

#### B. Waiver

The Applicant must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or relatives. In this case, the qualifying relative is the Applicant's lawful resident spouse.<sup>3</sup> With the waiver application, the Applicant submitted an affidavit from her spouse, her spouse's medical records, and documents related to her conviction. The record also contains civil documents and other supporting documentation for the Form I-485, Application to Adjust Status. With the appeal, she submitted medical information and financial documentation.

The Applicant claims that her spouse will suffer medical, financial, and emotional hardship if he relocates to Ecuador with her. She states that her husband suffers from diabetes and high cholesterol, and his health will worsen over time. She maintains that he now has health insurance to pay for his medication, but in Ecuador they will have no insurance and little savings to cover medication costs. She further asserts that they will be unable to afford her spouse's medical expenses if they are unemployed. Her spouse states that he sees a doctor every month and he is tested every 3 months and that he also suffers from a hernia and leg cramps. He states that for the past 15 years he has worked as a taxi driver, and in Ecuador his age and health problems will make it difficult for him to compete with younger workers. The letter from his physician confirms that he suffers from diabetes, hyperlipidemia, and upper respiratory infections. The record contains documentation of copay entries for his prescriptions and information about diabetes, respiratory infections, high cholesterol, high blood pressure, and reflux esophagitis. The bank account statements show that the Applicant and her spouse have savings of \$300.

The record establishes that the Applicant's spouse would suffer extreme hardship if he were to accompany her to Ecuador. It shows that his health problems will likely affect his ability to obtain employment and adequate medical care. The record further shows he is not a native of Ecuador, has no ties there, and would be unfamiliar with the country and its customs and culture. In addition, the

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<sup>2</sup> N.J. R. Ct. Crim. R. 3:28, Guideline 4; see also *Pinho v. Gonzalez*, 432 F.3d 193, 195 n. 1 (3<sup>rd</sup> Cir. 2005) (discussing New Jersey's Pretrial Intervention Program).

<sup>3</sup> The record indicates that the Applicant has a child, but no documentation was submitted of her child's immigration status, and the Applicant does not reference any hardship to her child in her statements.

record establishes that the Applicant's spouse is in his 50s and has lived in the United States for 21 years and that long-term separation from his community, the health practitioners who are knowledgeable about his treatment plan, and his employment, which he has held for many years, will cause him significant hardship. When the evidence in the record is considered in the aggregate, it demonstrates that the Applicant's spouse would suffer extreme hardship if he relocates to Ecuador.

### C. Discretion

We now consider whether the Applicant merits a waiver of inadmissibility as a matter of discretion. The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). We must balance the adverse factors evidencing the Applicant's undesirability as a lawful permanent resident with the social and humane considerations presented to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Id.* at 300 (citations omitted). The adverse factors include the nature and underlying circumstances of the inadmissibility ground(s) at issue, the presence of additional significant violations of immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the presence of other evidence indicative of bad character or undesirability. *Id.* at 301. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where residency began at a young age), evidence of hardship to the foreign national and his or her family, service in the U.S. Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to good character. *Id.*

The unfavorable factors in this case are the Applicant's conviction for a crime involving moral turpitude, her unauthorized employment, and remaining in the United States beyond her period of authorized stay. The favorable factors are the extreme hardship to her spouse if the waiver is denied, her 15 years of residence in the United States, her remorse for her criminal actions, her monthly restitution payments, the passage of 6 years since her conviction, and the lack of any criminal activity since her conviction. Upon review, the positive facts in this case outweigh the negative factors such that a favorable exercise of discretion is warranted.

### III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has met that burden. She has established that her spouse would experience extreme hardship if the waiver is denied and shown that a favorable exercise of discretion is warranted. Accordingly, we withdraw our prior decision and sustain the appeal.

**ORDER:** The appeal is sustained.

Cite as *Matter of M-G-G-*, ID# 13020 (AAO July 1, 2016)