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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

#6

FILE: [redacted] Office: MEXICO CITY Date: NOV 05 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Ground of Inadmissibility under sections 212(a)(9)(B) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B) and (h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ayuni Sikka
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Deputy District Director ("district director"), Mexico City, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico 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 committed a crime involving moral turpitude. The applicant was further found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant seeks waivers of inadmissibility pursuant to sections 212(a)(9)(B) and 212(h) of the Act, 8 U.S.C. §§ 1182(a)(9)(B) and (h), in order to remain in the United States with his U.S. citizen wife and daughter.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the Acting Deputy District Director*, dated April 28, 2008.

On appeal, the applicant's wife asserts that she is enduring significant hardship due to the applicant's absence from the United States. *Statement from the Applicant's Wife*, dated April 27, 2010.

The record contains statements from the applicant, the applicant's wife, the applicant's father-in-law, the applicant's sisters-in-law, and the applicant's brother; documentation relating to the applicant's wife's income and expenses; documentation relating to the applicant's wife's prescription medication; educational documents for the applicant; a copy of the applicant's marriage certificate; a copy of a birth record for the applicant's daughter; death certificates for the applicant's mother- and father-in-law; a mortgage statement for the applicant's mother-in-law who is now deceased, and; documentation regarding the applicant's driving record and criminal conviction. The applicant further provided a document in a foreign language. Because the applicant failed to submit a certified translation of the document, the AAO cannot determine whether the evidence supports the applicant's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. With the exception of the untranslated document, the entire record was reviewed and considered in rendering this decision.

Section 212(a)(9) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> . . . .

> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The record shows that the applicant entered the United States without inspection in or about October 1996. He remained in the United States until approximately January 2007. Thus, he accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions in the Act took effect, until he departed in January 2007. This period totals over nine years. He now seeks admission as an immigrant pursuant to an approved Form I-130 relative petition filed by his wife on his behalf. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on appeal. Accordingly, he requires a waiver under section 212(a)(9)(B)(v) of the Act.

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

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

The record shows that, on June 10, 1998, the applicant was convicted of burglary in violation of chapter 720, Section 5/19-1 of the [redacted] *Certified Statement of Conviction/Disposition*, Case Number [redacted]. The Court sentenced the applicant to two years of probation. *Id.* at 2. Based on this conviction, the applicant was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral attitude. The evidence in the record supports the director's determination that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The Board of Immigration Appeals (Board) has "observed that moral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992). In order to determine whether a conviction involves moral turpitude, the decision-maker must "look first to the statute of conviction rather than to the specific facts of the alien's crime." *Matter of Silva-Trevino*, 24 I&N Dec. 687, 688 (A.G. 2008). Burglary offenses may or may not involve moral turpitude, depending on whether the crime intended to be committed at the time of entry involves moral turpitude. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946); *Matter of S-*, 6 I&N Dec. 769 (BIA 1955) (holding that possession of burglary tools is not a crime involving moral turpitude unless accompanied by an intent to use the tools to commit a crime involving moral

turpitude). Further, the Board has held that "[o]rdinarily, 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, 333 (BIA 1973).

At the time of the applicant's conviction in 1995, chapter 720, Section 5/19-1(a) of the Illinois Compiled Statutes, as amended, provided, in pertinent part:

> § 19-1. Burglary. (a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle as defined in The Illinois Vehicle Code, railroad car, or any part thereof, with intent to commit therein a felony or theft.

The above statutory provision encompasses offenses that may or may not involve moral turpitude. *See Matter of M-*, 2 I&N Dec. at 723; *Matter of Grazley*, 14 I&N Dec. at 333. The applicant has not presented, and the AAO is unaware of, any prior case in which a conviction has been obtained under chapter 720, Section 5/19-1 of the Illinois Compiled Statutes, as amended, for conduct not involving moral turpitude. Nevertheless, in accordance with the language of *Silva-Trevino*, the AAO will review the record to determine if the statute was applied to conduct not involving moral turpitude in the applicant's own criminal case.

Here, the record shows that the actions for which the applicant was convicted involved stealing a car stereo. *Statement from the Applicant*, dated May 16, 2008. The [redacted] theft statute requires an intent to deprive an owner permanently of the use or benefit of property. *See* Chapter 720, Section 5/16-1 of the Illinois Compiled Statutes. Accordingly, the AAO concludes that the applicant is inadmissible under section 212(a)(2)(A) of the Act for his crime involving moral turpitude. The applicant requires a waiver under section 212(h) of the Act.

In order for the present waiver application to be approved, the applicant must establish eligibility for waivers under both sections 212(a)(9)(B)(v) and 212(h) of the Act. The AAO will first examine whether the applicant meets the requirements for a waiver under the more restrictive standard of section 212(a)(9)(B)(v) of the Act. A waiver under section 212(a)(9)(B)(v) of the Act would also serve to waive inadmissibility under section 212(a)(2)(A) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 or parent of the applicant. Hardship to the applicant or his

children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative under section 212(a)(9)(B)(v) of the Act. 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).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of*

Ige, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

In the present matter, the applicant's wife explains that she has endured hardship since the applicant departed the United States. *Statement from the Applicant's Wife*, dated April 27, 2010. She states that the applicant was the primary provider for their family, and that she has experienced difficulty meeting her and her child's expenses. *Id.* at 1. She notes that her parents passed away, and that she now has responsibility for a mortgage and other bills. *Id.*

The applicant's wife expressed that she and her daughter miss the applicant, and that they are enduring significant emotional difficulty due to his absence. *Statement from the Applicant's Wife in Support of Appeal*, dated May 15, 2008. She described her relationship with the applicant, including that they met in January 2000 and became inseparable. *Id.* at 2. She added that their daughter was born on November 11, 2005. *Id.*

She provided that her mother was diagnosed with cancer in October 2007, and that she suffered tremendously until her death on March 31, 2008. *Id.* at 1. The applicant's wife added that she has been residing in her parent's house, thus she witnessed her mother's pain on a daily basis. *Id.* She expressed that her emotional difficulty was compounded by lacking the applicant's support. *Id.*

The applicant's wife stated that her father died on November 16, 2009, and that he did not have life insurance or savings. *Prior Statement from the Applicant's Wife*, dated January 19, 2010. She indicated that her family was left with responsibility for a mortgage payment, and that they had to borrow money to bury her father. *Id.* at 1. She added that her family had just finished repaying other family members who had loaned money to bury her mother. *Id.* She indicated that she has faced other expenses including the purchase of a car. *Id.* She noted that she does not earn sufficient income to meet her needs, including childcare expenses. *Id.* at 1-2.

The applicant's wife explained that the cost of traveling to Mexico requires approximately one month of her salary, and that their daughter knows the applicant only through telephone calls. *Statement from the Applicant's Wife in Support of Appeal* at 2. She stated that the applicant has missed many of their daughter's milestones due to his absence. *Id.* She commented that acting as a single parent for a toddler is a difficult task. *Id.* at 3.

The applicant's wife stated that her doctor wishes for her to take prescription medication for depression and anxiety. *Prior Statement from the Applicant's Wife* at 1.

The applicant's wife provided that she and the applicant wish to further their education in the United States, and wish for their daughter to attend U.S. schools. *Statement from the Applicant's Wife in Support of Appeal* at 3. She asserted that the best education she can offer her daughter is in the United States. *Id.*

The applicant's wife stated that residing in Mexico with the applicant would have a great impact on her. *Id.* She explained that the well-being of their daughter would be affected, in part because medical services are lacking in Mexico, particularly where the applicant presently resides. *Id.* She asserted that the unemployment rate is extremely high in Mexico, and that the regional economy is poor. *Id.*

The applicant submitted evidence that a doctor prescribed Zoloft and Lorazepam for his wife on January 18, 2010.

The applicant describes the history of his relationship with his wife. *Statement from the Applicant*, dated May 16, 2008. He provides that it would be very difficult for him to support his wife and daughter in the United States from Mexico. *Id.* at 2. He discusses his life in Mexico, and he provides that he lives in crowded quarters on a ranch with numerous family members, and that they have limited food. *Id.* He indicates that he would have to move his family to a city should his wife and daughter join him, yet that they would face dangerous conditions including possible kidnapping. *Id.* He explains that there are no opportunities for education in Mexico without money. *Id.* He adds that his wife would be unable to find employment due to her limited Spanish language proficiency. *Id.*

The applicant describes his and his wife's educational and career goals in the United States. *Id.* at 3. He indicates that he wishes to provide for his wife and daughter. *Id.*

Upon review, the applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied. The applicant has shown that his wife will endure extreme hardship should she remain in the United States without him. The applicant's wife expressed that she is experiencing significant emotional difficulty due to separation from the applicant. The applicant has presented evidence that his wife's mother died in March 2008, and her father died in November 2009. The applicant's wife stated that she resided with her parents, and that she was close with them and shared in their suffering due to health problems. The AAO acknowledges that the loss of both parents within a short period of time often creates great emotional suffering, and is not commonly faced by individuals who are residing separately from their spouse due to inadmissibility.

The applicant has shown that his wife is facing additional psychological hardship due to sharing in their daughter's loss of the applicant's presence. The AAO recognizes that the applicant's wife has financial concerns which are contributing to her emotional difficulty. While the applicant has not submitted complete financial information for his wife, the record supports that she earns a modest

income and that she would be unable to afford frequent travel to Mexico. It is evident that acting as a single parent for a toddler with childcare needs involves significant economic requirements.

The record shows that the applicant's wife sought treatment for mental health issues, as a doctor prescribed medications for anxiety. This fact supports that she is experiencing significant psychological difficulty.

All elements of hardship to the applicant's wife, should she remain in the United States, have been considered in aggregate. Based on the foregoing, the applicant has shown that his wife will suffer extreme hardship should she remain separated from him.

The applicant has shown that his wife would suffer extreme hardship should she relocate to Mexico. As discussed above, the record shows that the applicant's wife is facing significant psychological hardship, in part due to the recent loss of both of her parents. While the applicant's wife would be reunited with the applicant should she join him in Mexico, it is evident that she will continue to suffer significant emotional hardship.

The applicant and his wife expressed concern for economic and security conditions in Mexico, and the applicant has described the difficulty he faces there that sheds light on the experience his wife may encounter. The AAO takes notice that economic and employment conditions are less favorable in Mexico than they are in the United States, and that the applicant and his wife would likely face financial challenges there. *United States Central Intelligence Agency World Factbook: Mexico*, updated April 21, 2010 (estimating that in 2009 unemployment in Mexico was 5.6 percent, underemployment was as high as 25 percent, and in 2008 more than 47 percent of the population lived under the asset-based poverty line). The AAO observes that the United States Department of State issued a Travel Warning for Mexico, warning that crime and violence has escalated throughout the country in all cities and that U.S. citizens should take precautions and remain in well-known tourist areas. *United States Department of State Travel Warning: Mexico*, dated September 10, 2010. The applicant's wife and daughter face a risk of crime or violence in Mexico, and it is evident that the applicant's wife would endure additional psychological hardship due to concern for the safety of herself, her child, and the applicant.

The AAO acknowledges that the applicant's wife has concerns for the quality of medical care in Mexico that her family may receive. The record supports that the applicant's wife has received treatment for mental health issues in the United States, and it is evident that she would be separated from the doctor who provides her care should she relocate to Mexico.

The applicant's wife will face other factors of hardship should she reside in Mexico, including separation from her community and family in the United States, the loss of her current employment, and separation from her country of birth and lengthy residence. While these elements of hardship are commonly endured by individuals who relocate abroad due to the inadmissibility of a spouse, all factors of hardship are considered in aggregate.

Based on the foregoing, the applicant has established that his wife will experience extreme hardship should she relocate to Mexico to maintain family unity. Accordingly, the applicant has shown that

denial of the present waiver application "would result in extreme hardship" to his wife, as required for waivers under sections 212(a)(9)(B)(v) and 212(h) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra,* at 12.

The negative factors in this case consist of the following:

The applicant entered the United States without inspection and remained for a lengthy duration without a legal immigration status. The applicant was convicted for burglary in 1998.

The positive factors in this case include:

The applicant's criminal conviction occurred when he was age 18, and he has expressed remorse for his conduct that led to the conviction; the applicant's U.S. citizen wife will suffer extreme hardship should he be prohibited from residing in the United States; the applicant's U.S. citizen daughter will experience hardship should she remain separated from the applicant or reside in Mexico, and; the applicant has shown a desire to support his family and cultivate a strong family unit.

While the applicant's criminal conviction and violation of U.S. immigration law cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant also bears the burden of persuasion. *See Matter of Mendez-Moralez*, 21 I&N Dec. at 301 (applicant must show that he merits a favorable exercise of discretion). In this case, the applicant has met his burden that he is eligible for a waiver and he merits approval of his application.

ORDER: The appeal is sustained.