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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

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FILE:

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Office: MEXICO CITY, MEXICO

Date: JAN 04 2011

IN RE:

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APPLICATION:

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

ON BEHALF OF APPLICANT:

[REDACTED]

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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City, Mexico. The matter 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)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant was also found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an applicant convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and two U.S. citizen children. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated May 12, 2008, the acting district director found that the applicant had not established that his qualifying relative would suffer extreme hardship and that even if extreme hardship was shown the applicant did not warrant the favorable exercise of discretion. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated June 13, 2008 counsel states that the acting district director erred in not considering hardship to the applicant son, in finding that the applicant failed to disclose his criminal history, in classifying the applicant's conviction as an aggravated felony, and in stating that the hardship to the applicant's wife is typical of an extended absence between a husband and wife.

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 . . . is inadmissible.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral 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....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present.

However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record shows that the applicant was arrested on August 4, 2002 and charged with two counts of vehicle theft and once count of criminal mischief. On November 25, 2002 the applicant pled guilty to criminal mischief under section 18-4-501 of the Colorado Statutes and received a deferred sentence of two years probation for one count of vehicle theft under 18-4-409(4)(b). The second charge of vehicle theft was dismissed. On April 18, 2004 the applicant was arrested for disorderly conduct and the record does not indicate how this arrest was resolved. The applicant, born on February 24, 1980, was twenty-two years old at the time he committed the acts which led to his convictions.

Section 18-4-409(4)(b) of the Colorado Statutes states, in pertinent part:

(4) A person commits aggravated motor vehicle theft in the second degree if he or she knowingly obtains or exercises control over the motor vehicle of another without authorization or by threat or deception.... Aggravated motor vehicle theft in the second degree is a:

(b) Class 6 felony if the value of the motor vehicle or motor vehicles involved is one thousand dollars or more but less than twenty thousand dollars.

The AAO notes that the maximum sentence for a class 6 felony in Colorado is 18 months.

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, the BIA has indicated that 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 AAO notes that Section 18-4-409(4)(b) of the Colorado Statutes does not make a distinction as to whether a conviction under this section of the statute constitutes a permanent or temporary taking. Furthermore, the statement taken by the applicant at the time of his arrest indicates that he exercised control over a motor vehicle of another without authorization in that he had agreed to help two co-workers with a broken down truck and later found out that the truck had been stolen. Thus, the AAO will not conclude that the applicant's conviction for motor vehicle theft is a crime involving moral turpitude.

Section 18-4-501 of the Colorado Statutes states:

(1) Any person who knowingly damages the real or personal property of one or more other persons, including property owned by the person jointly with another person or property owned by the person in which another person has a possessory or proprietary interest, in the course of a single criminal episode commits a class 3 misdemeanor where the aggregate damage to the real or personal property is less than one hundred dollars...

The AAO notes that the BIA has found criminal mischief not to be a crime involving moral turpitude when evil intent is not an element of the crime. See *In Re M-*, 2 I. & N. Dec. 686 (BIA 1946); *In Re B-*, 2 I. & N. Dec. 867 (BIA 1947); *Matter of N-*, 8 I. & N. Dec. 466 (BIA 1959). In addition, malicious mischief was found not to be a crime involving moral turpitude where an alien damaged automobiles and the court found the act did not have the required baseness or depravity. *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995), Washington Criminal Statute 9A.48.080(1)(a) and 9A.04.110(12). The bare presence of some degree of evil intent is not enough to convert a crime that is not serious into one or moral turpitude. *Id.* Thus, the AAO finds that the applicant's conviction for criminal mischief is not

a crime involving moral turpitude and the applicant is not inadmissible under section 212(a)(2)(A) of the Act.

However, the applicant is inadmissible under section 212(a)(9)(B) of the Act. The record indicates that the applicant entered the United States without inspection in April 2003 and departed the United States in January 2007. Thus, the applicant accrued unlawful presence from April 2003 until January 2007. In applying for an immigrant visa the applicant is seeking admission within ten years of his January 2007 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) 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.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] 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 to the satisfaction of the Attorney General [Secretary] 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.

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 spouse is the only qualifying relative in this case. 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).

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.

The AAO notes that the record of hardship includes: numerous medical records and a developmental evaluation for the applicant's son, two statements from the applicant, two statements from the applicant's spouse, and financial documentation.

In a statement dated March 17, 2009, the applicant's spouse states that on March 8, 2009 her second child was born and that he soon had jaundice and was found to be anemic. She states that her son is required to go to the hospital frequently and that because the applicant is not with her she must do all of the childcare, including the care for her three year old child by herself. She states that there is no one else to help her. The applicant's spouse also states that she does not plan to visit the applicant in Mexico because of the violence on the border and in the alternative, the cost of plane tickets. She states that the applicant is always telling her about the violence in Mexico and the shooting and kidnappings where he lives. She states that he states that he is scared to go to the plaza in his town because of all of the violence.

She also states that she is suffering financially without the applicant and that on top of her normal monthly expenses she now has to pay for a babysitter and hospital bills.

The AAO notes that documentation received on October 19, 2010 indicates that the applicant's child continues to have medical problems. Medical documentation submitted indicates that the applicant's child suffers from hearing loss, hip girdle problems, and possible lymphatic vascular malformation of the left arm. The record indicates that on June 11, 2010 the applicant's child had an operation to treat his hearing loss and a report dated March 26, 2010 indicates that he is delayed in the development of his gross motor skills. In addition, documentation received on September 29, 2010 shows that the applicant's spouse's savings has been depleted from approximately \$22,000 when the applicant first left the United States to \$5,000 on August 31, 2010. The record also includes a tax return showing that the applicant's spouse earned approximately \$32,000 in 2009. The record also contains an article, dated July 22, 2010 referencing the State Department Travel Warning for Mexico.

The AAO notes that the record indicates that the applicant was born in Michoacan, Mexico and may be residing currently in this part of Mexico. The U.S. Department of State Travel Warning for Mexico, dated September 10, 2010 states that since 2006 the Mexican government has been engaged in an

extensive effort to combat drug-trafficking organizations (DTOs). The warning states that Mexican DTOs, meanwhile, have been engaged in a vicious struggle with each other for control of trafficking routes and in order to prevent and combat violence, the government of Mexico has deployed military troops and federal police throughout the country. The warning states that U.S. citizens should expect to encounter military and other law enforcement checkpoints when traveling in Mexico and are urged to cooperate fully as DTOs have erected unauthorized checkpoints, and killed motorists who have not stopped at them. The warning states further that in confrontations with the Mexican army and police, DTOs have employed automatic weapons and grenades and in some cases the assailants have worn full or partial police or military uniforms and have used vehicles that resemble police vehicles. The warning also states that according to published reports, 22,700 people have been killed in narcotics-related violence since 2006 including innocent bystanders. The AAO notes that the warning specifically states that the area of Michoacán is of particular concern. The warning states that the state of Michoacán is home to one of Mexico's most dangerous DTOs, "La Familia" and that in June 2010, 14 federal police were killed in an ambush near Zitacuaro in the southeastern corner of the state. The warning states further that in April 2010, the Secretary for Public Security for Michoacán was shot in a DTO ambush, that security incidents have also occurred in and around the State's world famous butterfly sanctuaries, and in 2008, a grenade attack on a public gathering in Morelia, the state capital, killed eight people.

The AAO finds that the applicant's spouse has established that she is suffering extreme hardship as a result of separation and would suffer extreme hardship as a result of relocation. The violence in Michoacan, Mexico is severe and the applicant's spouse would be relocating with two young children, one of whom requires ongoing medical care. The AAO finds that relocating to Mexico would mean the applicant's spouse would not only be putting her life in danger, but also the lives of her two small children. The AAO also finds that the applicant's spouse is suffering extreme hardship as a result of separation. The record indicates that the applicant's spouse is struggling financially and emotionally in caring for two small children, one with serious medical problems. The record also indicates that the applicant's spouse is concerned for her husband's safety in Mexico. Thus, the AAO finds when taken together, the hardships being suffered by the applicant's spouse as a result of separation rise to the level of extreme.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(a)(9)(B)(v) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long

duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country'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 the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf 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 in the present case are the applicant’s unlawful presence in the United States and the applicant’s criminal convictions.

The favorable factors in the present case are the extreme hardship to the applicant’s U.S. citizen wife and children if he were to be denied a waiver of inadmissibility and, as indicated by the applicant’s spouse, the applicant’s attributes as a good father and husband.

The AAO finds that the immigration violation and the crimes committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.