identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

H2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 17 2010

IN RE: [redacted]

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:

[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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico. She was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of Crimes Involving Moral Turpitude (CIMTs). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States.

The Director concluded that the applicant had failed to establish that she was eligible to file an application for waiver, and that the evidence in the record was not sufficient to establish that a qualifying relative would experience extreme hardship. The Director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on January 29, 2008.

On appeal, counsel for the applicant asserted that within 30 days of filing the appeal notice, the applicant would submit evidence that her removal would cause extreme hardship to her permanent resident daughter who has a mental illness. *Form I-290B, Notice or Appeal or Motion*, dated February 28, 2008. However, as of the date of this decision, the AAO has not received a brief or additional evidence from counsel. The record will be considered complete for purposes of rendering a decision on the appeal.

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.

In *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. 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).

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

(h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -

. . . .

(1) (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 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 . . . .

The record reflects that the applicant was convicted of Theft - $50 - $500, Texas Penal Code (Tex. Penal Code) § 31.03(e)(2), on October 3, 1995, in the Harris County District Court, Houston, Texas. [redacted] The record also indicates that the applicant was convicted of Theft - $50 - $500, Tex. Penal Code § 31.03(e)(2), on June 8, 1999, in the Harris County District Court, Houston, Texas[redacted]Theft has long been held to be a CIMT. *Matter of Garcia*, 11 I. & N. Dec. 521 (BIA 1966). The Board of Immigration Appeals (BIA) has held that in order to constitute a CIMT, a conviction for theft must involve a permanent taking. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that a violation of a retail theft statute reasonably allowed for the presumption that the conduct involved an intent to permanently deprive the owner of their property.

Texas Penal Code § 31.03 states, in relevant part:

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

(b) Appropriation of property is unlawful if:

(1) it is without the owner's effective consent;

(2) the property is stolen and the actor appropriates the property knowing it was stolen by another; or

(3) property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another.

* * *

(e) Except as provided by Subsection (f), an offense under this section is . . .

(2) a Class B misdemeanor if:

(A) the value of the property stolen is:

(i) $50 or more but less than $500; or

(ii) $20 or more but less than $500 and the defendant obtained the property by issuing or passing a check or similar sight order in a manner described by Section 31.06;

An examination of the statute reveals that it does not require the element of intent to permanently deprive someone of property, and as such, may encompass conduct which does not involve moral turpitude. In *Dedmon v. State*, 478 S.W.2nd 486 (Tex.Cr.App. 1972), the Texas Court of Criminal Appeals discussed the common law elements of what constituted a 'taking,' and did not require as an element the intent to permanently deprive someone of property. In another state case, *Griffin v. State*, 614 S.W.2d 155, 158 (Tex.Cr.App. 1981), the court held that a conviction for theft could not be maintained if the defendant proved the taking was temporary, but the court acknowledged that intent to permanently deprive someone of property had been carved out of the statute by changes in the law. As the statutory language and state law indicates that a conviction under the statute could encompass conduct not involving moral turpitude, it cannot be categorically considered a CIMT.

Since the full range of conduct proscribed by the statute at hand does not constitute a crime involving moral turpitude, the AAO must apply the modified categorical approach and engage in a second-stage inquiry by reviewing the record of conviction to determine if the conviction was based on conduct involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 698 (A.G. 2008). If necessary, the AAO may look beyond the record of evidence to review any relevant evidence which establishes whether or not the applicant's conduct involved moral turpitude. *Id.* at 703. 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. In this case the record contains the Certificate of Disposition, indicating the applicant was twice convicted of Theft $50 - $500, a class B misdemeanor; a copy of an Order of Deferred Adjudication relating to the applicant's October 1995 conviction; a copy of the applicant's Conditions of Probation; a copy of a Judgment on Plea of Guilty relating to the applicant's June 1999 conviction; and a copy of the Order of Termination of Probation.

An examination of the evidence in the record does not reveal the nature of the applicant's conduct and whether or not it involved moral turpitude. As such, it is necessary to look beyond the record in order to determine whether or not the applicant's conduct involved moral turpitude.

The record reflects that during the applicant's psychological evaluation, she testified that she was arrested for shoplifting on October 23, 1995 and April 28, 1999. *Statement* [redacted] *dated November 19, 2007.* In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense

would be committed with the intention of retaining merchandise permanently. The AAO finds *Matter of Jurado* instructive, and concludes, based on the applicant's own testimony, that the conduct which resulted in her two convictions for theft involved moral turpitude. The applicant does not contest her inadmissibility on appeal.

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, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's daughter is the 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-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.

The record includes, but is not limited to: copies of appointment notices for psychological evaluations from Texas Department of Assistive and Rehabilitative Services for the applicant's daughter, dated January 18, 2008, and January 24, 2008; a copy of a psychological evaluation of the applicant by [redacted] dated November 19, 2007; copy of a statement from [redacted] of the Family Service Center, dated May 12, 2000, stating the applicant attended counseling sessions in 1999; and copies of court records related to the applicant's convictions. The entire record was reviewed and all relevant evidence considered in rendering this decision.

On appeal counsel for the applicant asserts that the applicant's removal would cause an extreme hardship on the applicant's daughter who has a mental illness.

The record contains an examination report of the applicant by [redacted] and appointment notices for therapy services for the applicant's daughter. In her examination [redacted] discusses the applicant's daughter's mental health condition, and asserts that she:

> Suffers of a psychological chronic condition that has been treated for over 10 years now. She has received both in-patient and out-patient basis. She reports having been

> diagnosed with a Bipolar Disorder with Obsessive-Compulsive features. She has received different kind of medication and counseling.
>
> In 1999 and again in 2001 [she] was hospitalized for Major Depression and suicidal attempts at the [redacted] At present she is seeing no one for treatment and she's only supported, emotionally, physically, and financially, by her mother, [the applicant].

[redacted] fails to explain the basis of his observations concerning the applicant's daughter, except to note that at least some of his conclusions are based on what the applicant's daughter self-reported. There is no other direct, objective evidence which corroborates that the applicant's daughter has been diagnosed with Bipolar Disorder or Major Depression. In addition, there is no other evidence in the record which corroborates [redacted] reference to the applicant's daughter's hospital admissions. [redacted] examination was of the applicant, not her daughter, and her reference is not sufficient evidence to establish that the applicant's daughter has been diagnosed with a mental health disorder. The appointment notices for the applicant's daughter also fail to provide any substantive information about the applicant's daughter's mental health, and are not sufficient to support her self-reported assertions to [redacted].

The AAO acknowledges that the applicant's daughter will experience emotional hardship if she remains in the United States without the applicant, but the applicant has failed to demonstrate that this hardship, even when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship articulated in this case, based on the evidence in this record, does not rise above the common result of removal or inadmissibility and thus does not constitute extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

The record does not contain any evidence that the applicant's daughter is dependent on the applicant financially or physically. Without further evidence of other hardship impacts, such as physical or financial, which rise above those commonly experienced by the relatives of inadmissible aliens, the record does not establish that the applicant's daughter will experience extreme hardship if she remains in the United States separated from the applicant.

Finally, the applicant has not asserted, or submitted evidence to demonstrate, that her daughter would suffer extreme hardship in Mexico if she relocated there with the applicant. Accordingly, the AAO cannot determine that the applicant's daughter would suffer extreme hardship if she relocated to Mexico.

Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of a waiver under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.