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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUN 0 3 2015

FILE: [redacted]
APPLICATION RECEIPT: [redacted]

IN RE: Applicant: [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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

Thank you,

for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Denver, Colorado, denied the application. 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)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen children.

The field office director found that the applicant had failed to establish that her qualifying relatives would suffer extreme hardship as a result of her inadmissibility. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *Decision of the Field Office Director*, dated August 22, 2014.

On appeal the applicant asserts that the field office director failed to weigh all the factors in considering the hardship her children would suffer as a result of her inadmissibility. With the appeal the applicant submits statements from herself and her children. The record contains financial documentation, medical documentation for one of her children, school documentation for two of her children, country information for Mexico, and other evidence submitted in conjunction with the Application to Adjust Status (Form I-485). The entire record was reviewed and considered in rendering this decision.

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 –
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> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
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> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of

> such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (the Board) 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.)

The record indicates that the applicant entered the United States on January 3, 2001, as a B-2 visitor with a Border Crossing Card. The record reflects that on [redacted] 2001, the applicant was charged and subsequently convicted of Shoplifting; Retail Theft in violation of [redacted] Municipal Code 38-51.5, for which she received a $150 fine.

At the time of the applicant's conviction the [redacted] Municipal Code stated,

> Sec. 38-51.5. Shoplifting unlawful; retail theft.
>
> > It shall be unlawful for any person to take or conceal or exercise control over any goods, wares or merchandise (property) of another which is displayed or in any other manner offered for sale and which has an aggregate value of less than one thousand dollars ($1,000.00), when the person intends to avoid payment for the merchandise or knowingly deprives the person entitled to possession of the property of the use and benefit of the property.

On August 31, 2001, the applicant was convicted in District Court, [redacted] Colorado, of Theft - Under $100 in violation of state statute 18-4-401(1), (2)(a).

At the time of her convictions, Colorado statutes stated, in part:

> § 18-4-401. Theft

(1) A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception, and:

(a) Intends to deprive the other person permanently of the use or benefit of the thing of value;

(2) Theft is:

(a) A class 3 misdemeanor if the value of the thing involved is less than one hundred dollars;

The field office director therefore determined that the applicant has been convicted of two crimes involving moral turpitude and is thus inadmissible to the United States.

Generally, the crime of theft or larceny, whether grand or petty, involves moral turpitude. *Matter of Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974). The common law definition of larceny is a wrongful taking and carrying away of the personal property of someone else with the intent to permanently deprive the owner of that property. *See Matter of V-Z-S-*, 22 I&N Dec. 1338, 1346 (BIA 2000). The Model Penal Code defines theft as the unlawful taking of, or the unlawful exercise of control over, movable property of another with the intent to deprive him thereof. *Id.* at 1343; *see also* Model Penal Code § 223.2(1) (1980). The Board of Immigration Appeals has stated that under the common law, larceny is distinguishable from theft in that larceny includes all takings with a criminal intent to permanently deprive the owner of the rights and benefits of ownership. *Matter of V-Z-S-*, 22 I&N Dec. at 1345-46. By contrast, the Board has noted that theft statutes may encompass both temporary and permanent takings, and that a theft crime involves moral turpitude "only when a permanent taking is intended." *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). In *Matter of Jurado*, the Board 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. 24 I&N Dec. 29, 33-34 (BIA 2006).

In view of the above, we find the record establishes that the applicant's conviction for Shoplifting; Retail Theft under the [redacted] Municipal Code and Theft under the Colorado state statute are crimes involving moral turpitude as the applicant's thefts were committed with the intent to permanently deprive the owner of the property, and the applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act. On appeal the applicant has not contested the finding of inadmissibilty.[1]

At the same time that the applicant was convicted in [redacted] Colorado, of Theft, August 31, 2001, she was also convicted of Child Abuse - Negligence-No Injury in violation of state statute 18-6-401(1)(a)(7)(b)(II), a class 3 misdemeanor, for which she was sentenced to seven months of probation

[1] In a Motion to Reopen or Reconsider filed by the applicant following denial for her Application to Adjust Status (Form I-485) she contested the finding that she had two convictions for crimes involving moral turpitude as she asserted that her conviction for shoplifting was not a CIMT. The motion was denied by the field office and but in the present appeal the applicant has not contested the determination that she has two CIMT convictions.

and ordered to complete specified classes and pay fines.[2] A review of the record and the charge against the applicant indicates no injury occurred to a child but rather the applicant appears to have been charged in conjunction with the theft incident. State statutes show violations involving injury or continuous patterns of conduct fall under other sections. The Field Office Director did not find this to be a crime involving moral turpitude, and as the crime involved negligence rather than intentional conduct and no injury to or intent to injure a child, it does not appear to be a crime involving moral turpitude. *See Matter of Sanudo,* 23 I & N Dec. 968, 972-3 BIA (2006) (holding that where actual or intended physical harm to the victim is not required, assault and battery against a family or household member is not categorically a crime involving moral turpitude); *cf. Matter of Tran,* 21 I. & N. Dec. 291 (BIA 1996) (finding willful infliction of corporal injury on a spouse, cohabitant, or parent or child of the perpetrator's constitutes a crime involving moral turpitude). However, as the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for her two theft convictions, she requires a waiver under section 212(h) of the Act.

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

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
>
> . . . .
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

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. 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). The qualifying relatives in the applicant's case are her four U.S. citizen children.

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

[2] Pursuant to Colorado state statute 18-6-401(1)(a)(7)(b)(II) in effect at the time of the applicant's conviction, where no death or injury results, an act of child abuse when a person acts with criminal negligence is a class 3 misdemeanor.

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 removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the 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.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g.*, *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *Salcido-Salcido v. I.N.S.*, 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The applicant asserts that her children will suffer extreme emotional and financial hardship if she is unable to remain in the United States. She states that shortly after giving birth her oldest daughter lost her child and is suffering emotionally from that loss and needs the applicant's support. The applicant also asserts that her son needed her emotional support to complete his high school education while a younger daughter is an adolescent who needs her daily care. The applicant also gave birth in to another son for whom she states she is the primary caretaker.

The applicant's oldest daughter states that the applicant supports her children emotionally and financially. The daughter states that since losing her own child she suffers depression, mental instability, and high blood pressure, and that she needs the applicant's emotional support. She also states that the applicant pays some of her financial costs. The daughter further states that her sister is becoming a teenager and needs advice from the applicant, and that the applicant helped a brother graduate high school. The younger daughter states that the applicant is important to her as the applicant is always there for support, helps with her homework, buys her clothes, and takes her places. She further states that she would be heartbroken if the applicant lives in Mexico because she never leaves her mother's side. The applicant's son states that the applicant made him finish high school after, when learning the applicant had been denied residence, he went into a depression and took drugs to cope. He states that he still lives with her.

The applicant's marital status is unclear as her Biographic Information (Form G-325A) lists a spouse, but no date for termination of marriage, while the Petition for Alien Relative (Form I-130) indicates she is single with no prior spouses, and her 2013 income tax return was filed as head of household. Although the children's birth certificates list the same father, the record makes no other reference to the father or whether he provides any emotional or financial support for the children.

In reviewing the evidence in the record we find it establishes that the applicant's U.S. citizen children would suffer extreme hardship due to separation from the applicant. The record establishes that the applicant provides emotional and financial support for her children, including the two oldest, one of whom is married and the other has completed high school, and that the applicant is the primary care giver for her two youngest children, one still in school and the other an infant.

We also find the record to establish that the applicant's children would experience extreme hardship if they were to relocate to Mexico to reside with the applicant. The applicant states that she fears for the children's education in Mexico, their ability to adapt given their ages and grades in school, and their financial stability as she is unlikely to make the same wage to support her family.

The record indicates that the applicant was born in Mexico. The applicant's oldest daughter states that she worries about the danger of living in because of violence and lack of security. She asserts that the applicant would struggle to find a job that pays well and to live safely. She states that relocating to Mexico would be bad for the applicant's youngest son, who will need schooling, and the youngest daughter, who has never been to

According to a U.S. Department of State Travel Warning, U.S. citizens have been the victims of violent crimes by organized criminal groups in various Mexican states. It recommends deferred non-essential travel in areas of the state of Chihuahua and that any travel between cities be only on major highways and only during daylight hours. It reports that crime and violence remain serious problems throughout Chihuahua. *See* Travel Warning-U.S. Department of State, dated May 5, 2015.

The record establishes that the applicant's U.S. citizen children were born in the United States, where they have been educated and where some still attend school. To relocate to Mexico they would have to leave their communities while being concerned about safety and financial well-being. The Board of Immigration Appeals (BIA) found that a 15 year-old child who lived her entire life in the United States, who was completely integrated into the American lifestyle, and who was not fluent in Chinese, would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). We find *Matter of Kao and Lin* to be persuasive in this case due to the similar fact pattern. To uproot the applicant's children, notably her 12-year-old daughter, at this stage of education and social development to relocate would constitute extreme hardship. It has thus been established that the applicant's children would suffer extreme hardship were they to relocate to Mexico to reside with the applicant due to her inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that her U.S. citizen children would suffer extreme hardship were the applicant unable to reside in the United States.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales,* 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for relief must bring forward to establish that he or she merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the hardships the applicant's U.S. citizen children would face if the applicant is not granted this waiver, her gainful employment, the passage of 14 years since her convictions, and her apparent lack of a criminal record since that time. The unfavorable factors are the applicant's conviction for crimes involving moral turpitude and remaining beyond her authorized stay following her 2001 entry to the United States.

Although the applicant's immigration violations are serious, the record establishes that the positive factors in this case outweigh the negative factors and a favorable exercise of discretion is warranted.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained.