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U.S. Citizenship
and Immigration
Services

DATE: JUN 04 2013

Office: LOS ANGELES

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Taiwan who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so as to adjust status in the United States. The director denied the waiver application, finding that the applicant failed to establish that a denial of his admission would impose extreme hardship on a qualifying relative. *Decision of the Director*, dated March 2, 2012. The applicant filed a timely appeal.

On appeal, counsel contends that the applicant's U.S. citizen mother and son would suffer extreme hardship if the applicant were removed. Counsel also states that the applicant is eligible for a waiver under section 212(h) of the Act as a matter of discretion because his convictions were for "infractions" and misdemeanors, the applicant regrets his past criminal activity, and he has close ties to the United States.

The record includes, but is not limited to: conviction records; medical records relating to the applicant's mother; a letter from the applicant's mother's church; and educational records relating to the applicant's son. The entire record was reviewed and considered in rendering a decision on the appeal.

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

Criminal and related grounds. —

(A) Conviction of certain crimes. —

(i) In general. — Except as provided in clause (ii), any 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, or

(II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

The Board of Immigration Appeals (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.)

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals first applies the categorical approach. *Ocequeda-Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010) (citing *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir. 2008)). This approach requires analyzing the elements of the crime to determine whether all of the proscribed conduct involves moral turpitude. *Nicanor-Romero* at 999. In *Nicanor-Romero*, the Ninth Circuit stated that in making this determination there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude." *Id.* at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability can be established by showing that, in at least one other case, which includes the alien's own case, the state courts applied the statute to conduct that did not involve moral turpitude. *Nicanor-Romero* at 1004-05.

If the crime does not categorically involve moral turpitude, then the modified categorical approach is applied. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). This approach requires looking to the "limited, specified set of documents" that comprise what has become known as the record of conviction—the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment—to determine if the conviction entailed admission to, or proof of, the necessary elements of a crime involving moral turpitude. *Id.* at 1161 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132-33 (9th Cir. 2006)).

The record reflects that the applicant's criminal history is as follows:

- The applicant was charged on October 18, 1989 of forgery and counterfeiting in violation of Ca. Penal Code § 476a(a). He pled guilty to the offense and was sentenced to two years of probation and 15 days of community service.

- The applicant was arrested on January 17, 1992 in [REDACTED] California for “nonsufficient funds checks.” He was not charged with a crime.
- The applicant was arrested on March 7, 1992 in [REDACTED] California for possessing forged notes. He was not charged with a crime.
- The applicant was arrested on September 30, 1992 in [REDACTED] California. On October 2, 1992, he was charged with forgery in violation of Ca. Penal Code § 470, “possession of completed check, money order, traveler’s check, controller’s warrant or county warrant with intent to defraud” under Ca. Penal Code § 475a, “display or possession of forged driver’s license or identification card” under Ca. Penal Code § 470b, and “driving in willful or wanton disregard for safety of persons or property while fleeing from pursuing police officer” in violation of Ca. Vehicle Code § 2800.2. The court found insufficient cause for the charges under Ca. Penal Code §§ 475a and 470b and the charge under Ca. Vehicle Code § 2800.2 eventually was dismissed. However, the applicant was convicted of forgery pursuant to Ca. Penal Code § 470 and sentenced to 36 months “prob/jail.”¹
- The applicant was arrested on August 12, 1998 in [REDACTED] California for possession of a controlled substance in violation of Ca. Health and Safety Code § 11350(a). The applicant pled guilty and the court deferred judgment for 24 months for the applicant to participate in a drug diversion program. Upon completion of that program, the applicant’s plea was set aside and the case was dismissed pursuant to Ca. Penal Code § 1000.3.
- The applicant was arrested on April 23, 2000 for two counts of “fail to appear, writ promis[e].” The disposition of this case is not clear from the record.
- The applicant was charged on January 29, 2003 in the Superior Court of California in [REDACTED] of driving without a valid license in violation of Ca. Vehicle Code § 12500(a) and a speeding infraction in violation of Ca. Vehicle Code § 22349(a). The charge for driving without a license was dismissed. The applicant pled guilty to the speeding infraction and was ordered to pay a fine.

¹ On appeal, counsel for the applicant alleges that all charges brought against the applicant in 1992 were dismissed for insufficient cause on October 15, 1992. See *Counsel’s Brief*. However, the court transcripts the applicant submitted indicate that while the charges under Ca. Penal Code §§ 475a and 470b were dismissed for insufficient cause, the applicant was “held to answer to the Superior Court” as to the charges under Ca. Penal Code § 470 and Ca. Vehicle Code § 2800.2. Further records show that in proceedings before the Superior Court of Los Angeles, the Ca. Vehicle Code § 2800.2 charge was dismissed in “furtherance of justice,” but that the applicant was convicted of forgery under Ca. Penal Code § 470. In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not provided any support for his claim that he was not convicted of a crime in 1992.

The AAO notes that because the applicant's guilty plea to possession of a controlled substance in violation of Ca. Health and Safety Code § 11350(a) was set aside pursuant to a California statute following his completion of a drug treatment program, the crime does not qualify as a conviction for immigration purposes. The Ninth Circuit Court of Appeals has held that one whose offense would have qualified for treatment under the Federal First Offender Act (FFOA), but who was convicted and had his or her conviction expunged under state or foreign law, may not be removed on account of that offense. *See Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). In order to qualify for treatment under the FFOA, the defendant must have been found guilty of an offense described in section 404 of the Controlled Substances Act (CSA), 21 U.S.C. § 844; have not been convicted of violating a federal or state law relating to controlled substances prior to the commission of such an offense; and have not previously been accorded first offender treatment under any law. *See* 18 U.S.C. § 3607(a); *Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000). Section 404 of the CSA provides that it is "unlawful for any person knowingly or intentionally to possess a controlled substance" 21 U.S.C. § 844(a). The AAO notes that *Lujan-Armendariz v. INS* was overruled in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. July 14, 2011) (*en banc*); however, the ruling in *Nunez-Reyes v. Holder* applies only prospectively. *Id.* at 687. As such, the AAO applies *Lujan-Armendariz* to the applicant's 1998 conviction, which was his first and only controlled substance conviction, and finds that the conviction was eliminated for immigration purposes when his plea was set aside and the case dismissed.

Additionally, the AAO finds that the applicant's conviction for a traffic infraction under Ca. Vehicle Code § 22349(a) was not for a crime involving moral turpitude. At the time of the applicant's conviction in 2003, Ca. Vehicle Code § 22349(a) stated, "Except as provided in Section 22356, no person may drive a vehicle upon a highway at a speed greater than 65 miles per hour." Driving over the speed limit is not "inherently base, vile, or depraved" and does not involve moral turpitude. *See Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992).

However, the AAO finds that the applicant's two convictions for forgery are convictions for crimes involving moral turpitude which render him inadmissible. At the time of the applicant's conviction for forgery in 1992, Ca. Penal Code § 470 stated, in pertinent part:

- (a) Every person who, with intent to defraud, signs the name of another person, or a fictitious person, knowing that he or she has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, bond, covenant, bank bill or note, . . . is guilty of forgery.

At the time of the applicant's conviction for forgery and counterfeiting in 1989, Ca. Penal Code § 476a provided, in pertinent part:

- (a) Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depository, or person, or firm, or corporation, for the payment of money, knowing at the

time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depository, or person, or firm, or corporation, for the payment of such check, draft, or order and all other checks, drafts, or orders upon such funds then outstanding, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison.

Forgery has been held to be a crime involving moral turpitude. *See Matter of Seda*, 17 I&N Dec. 550 (BIA 1980). Furthermore, the Ninth Circuit Court of Appeals held in *Goldeshtein v. I.N.S.*, 8 F.3d 645 (9th Cir. 1993), that fraud crimes involve moral turpitude if intent to defraud is (1) an essential element of the crime or (2) implicit in the nature of the crime. An intent to defraud applies to all of the elements contained in both section 470 and section 476a(a) of the California Penal Code. Accordingly, convictions under both sections of law categorically apply to conduct involving moral turpitude. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act based on his forgery convictions under Ca. Penal Code §§ 470 and 476a(a). Although the applicant does not address his 1989 forgery conviction and alleges that the charges brought against him in 1992 were dismissed, he has not contested the finding that he is inadmissible for having been convicted of crimes involving moral turpitude.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the

application of subparagraph (A)(i)(I) of subsection (a)(2) if the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the activities for which the applicant was found inadmissible occurred more than 15 years ago, they are waivable under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

In his brief, counsel states that the applicant "expresses great remorse" regarding his convictions in 1998 and 2003. Counsel asserts, "He has reformed, and has not violated any laws since his last conviction in 2003." However, counsel fails to acknowledge the applicant's conviction for forgery in 1989 and provides no evidence for his assertion that the applicant was not also convicted for forgery in 1992. Additionally, the record does not contain a statement from the applicant expressing any remorse for his actions. Furthermore, the AAO notes that the applicant has been arrested at least seven times between 1989 and 2003. Aside from the very brief statement of counsel, which does not qualify as evidence, the applicant has not submitted any support for a finding that he has been rehabilitated. The AAO therefore finds that the applicant has failed to demonstrate that his admission to the United States will not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives in this case are the applicant's mother and son. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (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 U.S. 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. *See Salcido-Salcido v. INS*, 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.

Counsel for the applicant claims that the applicant's 85-year-old mother resides with the applicant and his family and relies on them for support. Counsel states that the applicant and his

wife take the applicant's mother to doctor's visits three to four times per month. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Medical records indicate that the applicant's mother has been diagnosed with "[d]egenerative disc and facet disease, which creates severe spinal canal stenosis at L-3-L-4 and L4-5, exacerbated at L4-5 by anterolisthesis." See *Report, Diagnostic Medical Group of Southern California*, dated January 17, 2011. However, the record does not contain an explanation of the effects of the applicant's mother's health condition on her ability to care for herself or function on a daily basis. While the record also contains a document from the "[redacted]" which contains handwritten entries under columns labeled "illnesses," that document is illegible. See *Medical Problems, Labs, X-ray and Vaccination Flow Sheet*. Additionally, although the record contains documentation of the applicant's mother's prescriptions and doctor's visits, that documentation provides no detail which might indicate that she suffers from serious illnesses or that she is in need of regular care. See *Medicare Summary Notice*, dated August 2, 2011. Furthermore, the record does not contain a statement from the applicant's mother indicating that she would suffer any hardship if the waiver application were denied. Finally, the applicant has not asserted that his mother would suffer any hardship if she were to relocate to Taiwan with the applicant. Therefore, the AAO cannot find that the applicant's mother would suffer extreme hardship if the waiver application were denied.

Counsel also alleges that the applicant's son, [redacted] age 11, would suffer extreme hardship if the waiver application were denied. Counsel contends that if the applicant were removed, [redacted] would be forced to relocate to Taiwan. According to counsel, relocation would be difficult for [redacted] because he is unfamiliar with the culture in Taiwan and does not speak, read, or write in any language other than English. Additionally, counsel states that [redacted] is enrolled in a program for gifted students at school and that he would be deprived of such educational opportunities in Taiwan. However, as mentioned above, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The record does not contain a statement from the applicant, his wife, [redacted] or any other individual indicating that Alton would experience hardship if the applicant were removed. While the applicant has submitted school records demonstrating that [redacted] is enrolled in the Gifted and Talented Program and that he has earned high grades and test scores, such evidence is insufficient to establish that a denial of the waiver application would create extreme hardship for [redacted]. The AAO notes that unfamiliarity with another culture and inferior educational opportunities upon relocation generally are insufficient alone to establish extreme hardship to a qualifying relative. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 568 (BIA 1999). Accordingly, the AAO finds that the applicant has failed to demonstrate that a denial of his waiver application would result in extreme hardship for a qualifying relative as required under section 212(h)(1)(B) of the Act.

As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

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In proceedings for an application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. 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.