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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

H2

[redacted]

FILE: [redacted] Office: CHICAGO Date: SEP 0 1 2009

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Shumway

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Chicago, Illinois denied the waiver application that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico, the wife of a U.S. lawful permanent resident (LPR), the mother of three U.S. citizen children, and the beneficiary of an approved Form I-130 petition. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her LPR husband and U.S. citizen children.

The director found the applicant inadmissible for having been convicted of making a false affidavit for a driver's license. The director also found that the applicant had failed to establish that denial of the waiver application would impose extreme hardship on any qualifying member of the applicant's family, and denied the waiver application.

On appeal, counsel asserted that the applicant's husband and children would suffer extreme hardship if she is not permitted to remain in the United States. The entire record has been reviewed in rendering a decision on the appeal.

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.
>
> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-
>
> > (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 (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. Finally, in all such inquiries, the burden is on the alien to establish "clearly and beyond doubt" that he is "not inadmissible." *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

The record shows that, on April 23, 2004, in Rockford, Illinois, the applicant, then using the name [redacted], was arrested on a charge of violating 625 Illinois Compiled Statutes (ILCS) 5/6-302(a)(1), making a false affidavit for a drivers license. On May 23, 2002, the applicant was convicted, pursuant to her plea of guilty, of that offense, placed on two years probation, and fined.

The applicant, who was born on December 21, 1970, was 33 years old at the time she committed the act that resulted in her conviction.

At the time of the applicant's conviction, 625 ILCS 5/6-302 stated, in pertinent part:

> (a) It is a violation of this Section for any person:
>
> > 1. To display or present any document for the purpose of making application for a driver's license or permit knowing that such document contains false information concerning the identity of the applicant . . . .
>
> (b) Sentence.
>
> > 1. Any person convicted of a violation of this Section shall be guilty of a Class 4 felony.

Under Illinois law, a Class 4 felony is punishable by imprisonment of one to three years.

The statute at 730 ILCS 5/5-8-1(a) provides, in pertinent part,

> (a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:
>
> . . . .
>
> (7) for a Class 4 felony, the sentence shall be not less than 1 year and not more than 3 years.

Although counsel did not initially contest the finding that the applicant's conviction was for a crime involving moral turpitude, the AAO will review that determination as part of its *de novo* inquiry into the applicant's inadmissibility.

Preliminarily, on April 28, 2009, the AAO sent counsel a request for evidence noting the recent change in the law pursuant to *Silva-Trevino* and requesting evidence that the law pursuant to which

the applicant had been convicted had been previously applied to behavior that did not evince moral turpitude and/or that the applicant's behavior in the instant case did not evince moral turpitude. Counsel responded with a brief, stating that the ruling in *Silva-Trevino* is incorrect, and that whether a conviction is for a crime involving moral turpitude should be determined by a categorical inquiry as outlined in *Padilla v. Gonzales*, 297 F.3d 1016, 1019 (7th Cir. 2005). Counsel stated that pursuant to the categorical approach, the violation pursuant to which the applicant was convicted does not constitute a crime involving moral turpitude, and the applicant should, therefore, not be found inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. Counsel stated that the ruling by the Attorney General in *Silva-Trevino* ". . . creates an almost impossible task or standard for the [applicant] to meet."

The AAO will apply the test described in the *Silva-Trevino* decision as it is bound by that decision pursuant to section 103(a)(1) of the Act, which states that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling" on the Department of Homeland Security. Prior precedent notwithstanding, the AAO must accept the determinations and rulings by the Attorney General in *Silva-Trevino* in this matter as that decision has not been overruled by the Seventh Circuit Court of Appeals.

Counsel did not provide any evidence of a prior case in which a conviction was obtained under 625 ILCS 5/6-302(a)(1) for conduct that did not involve moral turpitude, and the AAO is unaware of any such prior case. Counsel did not provide any evidence that the applicant's behavior that resulted in her conviction did not involve moral turpitude. The AAO therefore finds the applicant inadmissible under section 212(a)(2)(A)(i)(I) as a consequence of her conviction for making a false affidavit for a driver's license.

The balance of this decision will pertain to whether waiver of that inadmissibility is available and whether the applicant has demonstrated that waiver of that inadmissibility, if available, should be granted.

Section 212(h) of the Act provides that,

> The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of [section 212(a)(2)(A)(i)(I) of the Act]
>
> . . . .
>
> (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 [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 . . . .

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the qualifying relatives are the applicant's husband and children. Hardship to the applicant herself is not directly relevant under the statute and will be considered only insofar as it

results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted.)

The AAO notes that in *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted.) Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Court defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant and in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record contains various letters, purportedly from the applicant's children,[1] stating that their mother illegally acquired a driver's license for a variety of reasons, but that the acquisition was without malice. Those letters further state that the applicant's children love her, that they would not want to be separated from her, and that moving to Mexico would cause them hardship because they have never been there.

In a declaration dated on or about September 20, 2006 and in an undated letter, the applicant's husband stated that the applicant obtained her illegal driver's license because she had a full-time job and three children and felt it was necessary. He also stated that their oldest child has epilepsy and needs to be seen by a doctor every three months, that his wife is from a small town in Mexico where adequate care would be unavailable, and that they would be unable to pay for such care in Mexico. The applicant's husband's letter also indicates that applicant works full-time and contributes her salary to support the family.

Further, the applicant's husband stated he is unable to move from his current residence because he must retain his job to support his children, and that the children need to be with their mother because of their ages. Further still, he stated that his son requires a doctor's visit at least once a month and sometimes requires an emergency room visit. He also stated that his wife handles the family's finances.

The record contains letters, dated February 2, 2006 and August 24, 2006, from [redacted], a neurologist, who states that the applicant's oldest child has seizures for which he is on medication. [redacted] enclosed information pertinent to seizures and suggested safety precautions.

The record contains a note, dated April 8, 2004, and written on the prescription pad of [redacted]. That note indicates that the applicant's oldest child is in treatment for depression and obsessive compulsive disorder. That note further indicates that for the applicant's child to leave the United States would be detrimental to him, but without specifying how it would be detrimental or the gravity of the alleged detriment.

The record contains an undated letter from an assistant office manager at P.M. Armor, Inc., of Mount Prospect, Illinois. That letter states that the applicant is employed by that company, that the applicant's oldest child has epilepsy, and that the applicant is his primary caregiver.

The record contains another letter, dated April 1, 2004, from an office manager for the applicant's employer. That office manager stated that the applicant has worked for that employer since August 26, 2002, that she was, when that letter was written paid $9 per hour, and that she then worked five to ten hours of overtime per week in addition to her 40-hour full-time schedule. That income stream would equate to $22,500 to $27,000 annually, given that the applicant is paid time and a half for the additional five to ten hours per week.

A 2001 Form 1040, U.S. Individual Income Tax Return and Form W-2, Wage and Tax Statement, show that the applicant's husband earned $10,414 in wages and had total income of $14,745 during

[1] Some of those letters are unsigned and undated. One letter that purports to be from all three children is written in the first person singular.

that year, the balance being unemployment compensation paid to the applicant's husband during that year. The record contains no evidence that the applicant had any income during that year.

A 2002 Form 1040 and W-2 form show that the applicant declared total income of $6,784 during that year, all of which consisted of wages paid to the applicant. The record does not show that the applicant's husband earned any income during that year.

Two 2003 W-2 forms show that the applicant earned $21,931 and her husband earned $18,252 during that year. Their joint 2003 Form 1040 shows that they had no other earned income.

The record contains no evidence pertinent to the applicant's family's monthly expenses in their current living situation. The record does not indicate how much the applicant's husband would be obliged to remit to support the applicant and their children in Mexico, assuming that the applicant and her children went to Mexico without him, and the applicant was unable to find employment there.

Although the loss of almost any amount of income represents a hardship, the record contains no evidence that allows the AAO to determine that the loss of the applicant's income, whether or not the children joined her in Mexico, would cause a financial hardship to her husband and children which, when considered together with the other hardship factors in this case, would rise to the level of extreme hardship. Further, because the record contains no evidence of the applicant's or the applicant's husband's prospects for employment in Mexico, the AAO cannot determine whether any qualifying family member would suffer extreme hardship if the applicant's husband joined the rest of the family in Mexico.

The note from [redacted] is sufficient to show that the applicant's oldest child has some mental health issues. However, the conclusory assertion by the doctor that leaving the United States would be "detrimental," with no further explanation, is insufficient to demonstrate any hardship.

The letter from demonstrates that the applicant's son has seizures. That letter and the accompanying materials, however, do not demonstrate the severity of his condition, and they do not demonstrate that he would be at any risk by living in Mexico, or that he would be placed at risk by living in the United States if the applicant were removed to Mexico.

The applicant's husband's letter alleges that the child would be unable to obtain suitable medical care in Mexico, either because it is unavailable, or because it is unavailable in the applicant's hometown, or because the family would be unable to afford medical care that is available. The record contains no supporting evidence, however, to demonstrate that the medical care available in Mexico, or in and around the applicant's hometown, is insufficient. Further, the record contains no evidence to support the applicant's husband's assertion that the family would be unable to afford the requisite level of care in Mexico.

The evidence submitted is insufficient to show that the applicant's removal to Mexico, whether or not her children join her, would occasion medical hardship to her husband or to her children which, when considered together with the other hardship factors in this case, would rise to the level of extreme hardship.

The remaining hardship analysis is pertinent to what might be termed emotional hardship.

Although the applicant's husband and children have indicated that the children have never been to Mexico, that is an insufficient reason to conclude that to live there would cause them hardship. The record contains insufficient evidence to demonstrate that, if they moved to Mexico, the applicant's children would suffer hardship which, when considered together with the other hardship evidence in the record, would rise to the level of extreme hardship.

The record demonstrates that the applicant has very loving and devoted family members who are extremely concerned about the prospect of the applicant's departure from the United States. Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances.

In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme* hardship," Congress made plain that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse or parent is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the standard in INA § 212(i), the hardship must be greater than the normal, expected hardship involved in such cases.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse and children face extreme hardship if the applicant is refused admission. Rather, the record suggests that they will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse or parent is removed from the United States.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship.

The U.S. Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The AAO therefore finds that the applicant failed to establish extreme hardship to her LPR spouse or her U.S. citizen children as required under INA § 212(h), 8 U.S.C. § 1186(h) and that waiver is therefore unavailable. Because the applicant has been found statutorily ineligible, the AAO need not address whether the applicant merits waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.