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

U.S. Citizenship and Immigration Services

[redacted]

H2

Date: FEB 01 2012 Office: WASHINGTON, DC FILE: [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 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,

Michael Hammerschlag

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Peru 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 a crime involving moral turpitude. She seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen husband and daughter.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director,* dated July 28, 2009.

On appeal, counsel for the applicant asserts that the applicant's husband and daughter will suffer extreme hardship should the present waiver application be denied. *Statement from Counsel on Form I-290B*, dated August 27, 2009.

The record contains, but is not limited to: statements from counsel; statements from the applicant, as well as the applicant's husband, daughter, and sister-in-law; copies of documents relating to the applicant's family's employment, taxes, banking, and property ownership; medical documentation for the applicant's husband; documentation of the applicant's daughter's academic activities; and documentation associated with the applicant's criminal conviction. 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 –
>
> (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 *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

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

of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

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

The record shows that on July 23, 2002, the applicant pled guilty to a charge of embezzlement under Virginia Code § 18.2-111, for which he was sentenced to 12 months of incarceration. Based on this conviction, the applicant was found to be inadmissible under to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The applicant does not contest his inadmissibility on appeal. The applicant requires a waiver under section 212(h) of the Act.

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

> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .
>
> (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 . . .; and
>
> (2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe,

> has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

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 husband and daughter are the qualifying relatives 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).

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).

In a statement dated August 25, 2009, the applicant explains that she met her husband in high school and that they waited for nine years for him to become a lawful permanent resident and then immigrated to the United States. She states that they were separated for two years once he immigrated, and that she does not wish to endure family separation again. She noted that she and their daughter share a close relationship, and she cannot imagine being separated from her.

In a statement dated August 25, 2009, the applicant's husband asserts that he and their daughter will experience extreme hardship should the applicant return to Peru. He notes that his family attempts to help them, but they are unable to replace the applicant. He explains that he grew up with his parents, seven sisters, and two brothers, and that he is used to having family surrounding him. He adds that it is difficult to earn a living in Peru if you are past the age of 35. He provides that the applicant has a life in the United States and steady employment. He asserts that the applicant provides emotional support and guidance for him and their daughter. He states that he had surgery twice in one month, and the applicant comforted him and assisted with their financial needs. In a statement dated May 12, 2009, the applicant's husband provided that their daughter was born in 1993, and that all his family immigrated from Peru to the United States in 1999.

In a statement dated August 25, 2009, the applicant's daughter expresses that she will endure significant hardship if the applicant returns to Peru. She describes the applicant's efforts in caring for her, teaching her, and supporting her emotionally and physically. She states that she fears that she and her father would face financial problems without the applicant. She provides that the applicant's husband suffers from heart problems, and he had surgery for kidney stones. She explains that she wishes for the applicant to remain with them so they can continue to live as a close family.

Upon review, the applicant has not shown that a qualifying relative will suffer extreme hardship should the present waiver application be denied. The applicant has not provided sufficient evidence regarding claims of her husband's health problems. The applicant submits medical documentation for her husband that supports that he has experienced kidney disease, including a procedure on or about July 8, 2009. However, the record lacks a summary from a medical professional discussing the applicant's husband's health status or treatment needs, or explaining the impact his health has on his ability to engage in common functions. The applicant's husband works as a carpenter, and this fact suggests that his physical health does not significantly impact his daily functioning. Nor does the record show that he requires assistance from the applicant or others. It is noted that the applicant has not asserted that her husband would lack access to medical care in Peru. The AAO has carefully considered the medical evidence provided, but is unable to conclude that the applicant's husband's health will elevate his challenges to an extreme level, whether he relocates to Peru remains in the United States.

The record does not support that the applicant's husband would face significant financial difficulty in the applicant's absence. The applicant has not submitted a complete account of their household expenses, or presented any unusual economic needs. The applicant has not shown that her husband's income would be insufficient to meet his requirements. The applicant's husband asserted that earning a living beyond age 35 is difficult in Peru, but the record contains no reports or other documentation to support this assertion. The applicant has not addressed whether she and her husband have family members remaining in Peru who may assist them in obtaining employment. Thus, the record does not show that the applicant's husband would endure significant financial hardship, whether he remains in the United States without the applicant or returns to Peru.

The applicant's husband is a native of Peru, and he immigrated to the United States in 1999. It is presumed he would not face the difficulty of adapting to an unfamiliar language or culture should he return there. He noted that he grew up in a household with his parents and nine siblings, presumably in Peru, and the applicant has not stated whether some or all of these relatives remain in Peru such that her husband would have the support of close family members should he reside there.

It is evident that the applicant's husband would suffer emotional difficulty should he remain in the United States without the applicant. The AAO acknowledges that he and the applicant have a lengthy relationship, and that the separation of spouses often results in considerable psychological hardship. Due consideration is given to the descriptions of the closeness of the applicant's family. It is noted that, while the record contains description of the applicant's wife's emotional challenges during their two-year separation, there is no clear description of the applicant's husband's experience during that time.

Based on the foregoing, the AAO is unable to conclude that the applicant's husband would suffer extreme hardship should the present waiver application be denied, whether he remains in the United States or returns to Peru to maintain family unity.

The applicant has not shown that her 18-year-old daughter will suffer extreme hardship should she return to Peru, particularly if the applicant's husband accompanies them. It is evident that the applicant's daughter has invested considerable effort adapting to life in the United States, including engaging in academic activities and learning English. However, the record also supports that she is a native and citizen of Peru, and she would not face the difficulty of transitioning to an unfamiliar culture should she return. As noted above, the record is not clear regarding whether the applicant, her husband, and her daughter continue to have other family members in Peru. Given that they have a large extended family, the record suggests that they may continue to enjoy family and community support there. The AAO acknowledges that the applicant's daughter has academic and career goals in the United States, but the record does not establish that she would be unable to engage in meaningful academic and career pursuits in Peru. The hardship to the applicant's daughter as presented in the record is largely based on separation from the applicant, and it is evident that she would not be separated from the applicant should they return to Peru. The applicant has not presented other elements of hardship to her daughter upon relocation, such as economic or health concerns.

The AAO recognizes that the applicant and her daughter share a close bond, and her daughter would face significant emotional difficulty should they reside apart. The AAO has examined the assertions and evidence submitted to support that the applicant's daughter would suffer hardship should she remain in the United States. Yet, the applicant has not shown that her daughter would endure unusual financial challenges, that her academic pursuits would be interrupted, or that she would lack the support of her father or other relatives. Considering all assertions in total, the record does not established that her difficulty would rise to an extreme level.

Based on the foregoing, the applicant has not established that her daughter will suffer extreme hardship should the present waiver application be denied, whether she relocates to Peru remains in the United States. As the applicant has not shown that denial of the present waiver application "would result in extreme hardship" to a qualifying relative, she has not established eligibility for a waiver under section 212(h) of the Act. Accordingly, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings regarding a 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.