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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: AUG 1 2 2013 Office: LOS ANGELES 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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 Nicaragua who was found to be inadmissible under and under section 212(a)(2)(A)(i)(I) 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[1]. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his lawful resident spouse and daughter and U.S. citizen son.

The field office director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated July 18, 2011.

On appeal counsel for the applicant asserts that the applicant is not inadmissible as his convictions, though CIMTs, arose from the same action and the applicant was sentenced on each count to three months, running concurrently. Counsel further asserts the applicant's spouse has hearing and speech handicaps and her children are not able to provide help. The record contains a statement from the applicant's spouse and a letter from the spouse's physician with medical documentation.

The record reflects that the applicant was convicted on May 30, 1995, for one count of Conspiracy in violation of 18 U.S.C. § 371 and four counts of False Statement in violation of 18 U.S.C. § 1001. The record reflects that the applicant along with four other individuals charged and collected fees from unqualified aliens for the preparation of fraudulent I-360 Special Immigrant Religious Worker petitions that were submitted to the U.S. Immigration and Naturalization Service.

At the time of the applicant's conviction, 18 U.S.C. § 371 provided, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

Title 18 U.S.C. § 371 is divisible because it "creates two crimes, first, a conspiracy to commit an offense against the United States, and, second, a conspiracy to defraud the United States in any manner or for any purpose." *Matter of E*, 9 I&N Dec. 421, 423 (BIA 1961). A conspiracy to commit an offense involves moral turpitude if the substantive offense involves moral turpitude. 9 I&N Dec. 421, 423. For example, in *Matter of Gaglioti*, the BIA found that the alien's conviction for conspiracy to establish gaming devices did not involve moral turpitude because the underlying offense did not involve moral turpitude. 10 I. & N. Dec. 719 (BIA 1964).

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[1] The field office director also found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission to the United States through fraud or misrepresentation, however the basis for this finding is unclear from the decision.

In the instant matter, the conviction record reflects that the applicant was convicted of conspiring to defraud the United States. *See Indictment and Plea Agreement for Case CR 95-147-ABC.* Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded: "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951). Furthermore, the BIA in *Matter of E* held: "Conspiracy to defraud the United States under 18 U.S.C. 371 by impeding, obstructing and attempting to defeat the lawful functions of an agency of the United States is a crime involving moral turpitude." 9 I&N Dec. at 427. Therefore, the applicant's conviction under section 18 U.S.C. § 371 is a crime involving moral turpitude, and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was also convicted of four counts of violating 18 U.S.C. § 1001, which states:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years.

The AAO determined that the applicant was convicted of crimes involving moral turpitude. Counsel does not contest that the applicant was convicted of CIMTs, but states that the applicant is not inadmissible because he fits into an exception under 212(a)(2)(A)(ii)(II).

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 AAO finds that the applicant's conviction does not qualify for the petty offense exception. The petty offense exception under 212(a)(2)(A) of the Act requires that the maximum penalty possible for the crime of which the alien was convicted must not exceed imprisonment for one year, and the applicant must not be sentenced to a term of imprisonment in excess of six months. Although the applicant was given two concurrent sentences of three months, the maximum penalty possible for a conviction under 18 U.S.C. § 371 and under 18 U.S.C. § 1001 is imprisonment of five years, beyond the maximum penalty possible of one year as required for exception under this section of the Act.

The waiver for inadmissibility under section 212(a)(2)(A) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

> (h) 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
>
> (ii) 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 . . .

The record reflects that the activity for which the applicant was later convicted occurred from February 1994 to February 1995, which meets the threshold requirement for consideration under section 212(h)(1)(A)(i) of the Act. An application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). In the present case, while the applicant meets the threshold requirement for consideration under section 212(h)(1)(A)(i) of the Act, he has not established by a preponderance of the evidence that he has been rehabilitated as required. Although there is no indication that the applicant had subsequent arrests or convictions, no documentation has been submitted to the record and the applicant has made no statement to support that he has been rehabilitated since his conviction for crimes involvement moral turpitude.

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 wife and two children. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 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 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. *See Salcido-Salcido*, 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 states that the applicant's spouse would experience extreme hardship due to separation from the applicant because of her dependence on him as she has hearing and speech handicaps and her children are unable to provide help. The applicant's spouse states she has little communication with her children and that contact is through the applicant. She states that she desperately needs the applicant to help her through her life. She states she is totally dependent on the applicant for shopping and contact with the hearing world, and that if he is removed to Nicaragua she would go with him as she cannot function without him. She further states her income alone would not allow her to sustain herself and that without the applicant she would have no contacts outside of her employment at the Catholic Deaf Center, where she has worked with members of the community for more than 10 years. A letter from a medical doctor states that the applicant's spouse is hearing impaired and uses hearing aids. Medical documentation submitted to the record indicates the applicant's spouse has limited expressive language skills.

The AAO finds that the record fails to establish that the applicant's qualifying spouse will suffer extreme hardship as a consequence of being separated from the applicant. Although the applicant's spouse states that she is dependent on the applicant for shopping, activities, and social contact, she also states that her employment of more than 10 years involves working with the community, and she did not explain why her adult children are unable to assist her with other needs. The applicant's spouse states that she cannot function without the applicant, but the record contains no detail or supporting evidence explaining the exact nature of any emotional hardships the applicant's spouse faces and how such emotional hardships are outside the ordinary consequences of removal. Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The applicant's spouse indicates that she needs the applicant's income, but no documentation has been submitted establishing the spouse's current income, expenses, assets, and liabilities or her overall financial situation, or the applicant's contribution, to establish that without the applicant's physical presence in the United States the spouse will experience financial hardship. Further, courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986).

The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, her situation if she remains in the United States is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record. The difficulties that the applicant's spouse would face as a result of her separation from the applicant, even when considered in the aggregate, do not rise to the level of extreme as contemplated by statute and case law.

With respect to relocating abroad to reside with the applicant due to his inadmissibility, the AAO notes this criterion has not been addressed.

Neither counsel nor the applicant have claimed nor submitted evidence of any hardship the applicant's children would experience either due to separation from the applicant or relocation abroad to reside with the applicant.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to his qualifying spouse as required under section 212(i) 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.

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 not been met.

ORDER: The appeal is dismissed.